Supreme Court of the United States

October Term, 1972

No. 72-549

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,
Petitioners,

v.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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INDEX

	Page
NS BELOW	1
CTION	3
TUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
ONS PRESENTED	4
ENT	5
troduction	5
roceedings Below	6
haracteristics of the Richmond Metropolitan Area	15
Geography, De nographic Patterns and General Interdependence	15
Patterns of Racial Composition of Metropolitan Area Schools, 1954-1971	22
(1) Richmond Schools	22
(2) Chesterfield Schools	25
(3) Henrico Schools	26
Richmond Metropolitan Schools	27
ate and Local Policies and Practices Insuring Maintenance Segregated Schools Throughout Sixteen-Year Period Following *Brown I*	30
State Policies and Practices	32
Local Policies and Practices	36
(1) Richmond	36
(2) Chesterfield	37
(3) Henrico	40
State and Local Discrimination in School Site Selection and Construction	44
segregation Plan Approved by District Court	47

Page

SUMMARY OF ARGUMENT 53

ARGUMENT 58

I. The District Court Neither Exceeded its Powers Nor Abused its Discretion in Approving a Desegregation Plan Involving the Assignment of Pupils Across Existing School Division Lines 58

A. In Light of the Evidence Presented, the Relief Decreed Resulted from a Sound Application of the Remedial Guidelines Previously Established by this Court 58

1. Interdependence Between Richmond, Henrico and Chesterfield and the Inevitable Effects of Such Mutual Dependency on Community and Student Perceptions 62

2. Proof Establishing Lack of Overriding Interest in Maintaining Existing School Division Lines or in Limiting the Assignment of Pupils to Schools Within the Political Subdivision Where They Reside 64

3. The Further Entrenchment of the Dual School System and the Containment of Blacks Since *Brown I* 67

4. Accentuation of the Gross Racial Disparities Since 1954 Attributable in Part to State and Local Discrimination Through 1971 68

5. Failure of the Three School Divisions Involved to Establish Unitary Systems by June, 1971 69

6. White Attrition in City Schools and the Foreseeable Effects Thereof 69

7. The Presentation of a Desegregation Plan Promising Realistically to Eliminate All Vestiges of the Dual School System 70

Summary 72

B. The Effectiveness of Relief in De Jure Metropolitan Areas Should Not Be Made Dependent Upon the Manner in Which a State Has Elected to Align its Local School Divisions 73

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Page

C. Justice Requires that the Means of Disestablishment Should be at Least Coextensive with those Used to Establish and Perpetuate the Statewide System of Dual Schools 77

D. The Continuing Denial of Equal Educational Opportunity Within the Richmond Metropolitan Area is Attested by an Application of the Rationale Underlying Both *Brown I* and a Traditional Goal of Education 83

II. The Decision of the Court of Appeals is Irreconcilable with Applicable Decisions of this Court and with Rationale Utilized by Other Federal Courts in Related Cases 92

A. The Test of the Court of Appeals for Assessing the Sanctity of Existing School Division Lines and the Existence of a Constitutional Violation is Predicated on a Judicial Standard Expressly Rejected by this Court 92

B. Even Under the Overly Restrictive Test of the Court of Appeals, the Record Herein Establishes that the Continued Maintenance of the Existing School Division Lines Has, in Part, Been Racially Motivated 97

C. The Judgment of the Court of Appeals Effectively Thwarts the Guidelines for the Fashioning of Effective Relief as Established in Prior Decisions of this Court 100

D. The Decision of the Court of Appeals Was Based on "New" Findings Achieved through a Significant Departure from the Standard of Appellate Review in School Desegregation Cases 104

E. The Rationale of the Court of Appeals Varies With That Utilized by Other Federal Courts in Related Cases 109

CONCLUSION 115

TABLE OF CITATIONS

Cases

Page

Adkins v. School Bd., 148 F.Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957) 32

Aytch v. Mitchell, 320 F.Supp. 1372 (E.D. Ark. 1971) 110

Bradley v. Milliken, Nos. 72-1809, -1814 (6th Cir., Dec. 8, 1972), *vacated for rehearing en banc*, (Jan. 16, 1973) 73, 113, 115

Bradley v. Milliken, No. 35257 (E.D. Mich. S.D., Mar. 24, 28, June 14, 1972) 113

Bradley v. Milliken, 338 F.Supp. 582 (E.D. Mich. S.D. 1971) 113

Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) ..7, 32

Bradley v. School Bd. of City of Richmond, 462 F.2d 1058 (4th Cir. 1972) 1, 14

Bradley v. School Bd. of City of Richmond, 456 F.2d 6 (4th Cir. 1972) 14

Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), *rev'd*, 382 U.S. 103 (1965) 3, 6

Bradley v. School Bd. of City of Richmond, 317 F.2d 429 (4th Cir. 1963) 3, 6

Bradley v. School Bd. of City of Richmond, 338 F.Supp. 67 (E.D. Va. 1972) 2, 12

Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971) 10

Bradley v. School Bd. of City of Richmond, 324 F.Supp. 396, 401 (E.D. Va. 1971) 10

Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456 (E.D. Va. 1971) 3, 44

Bradley v. School Bd. of City of Richmond, 324 F.Supp. 439 (E.D. Va. 1971) 10

Bradley v. School Bd. of City of Richmond, 51 F.R.D. 139 (E.D. Va. 1970) 8

Page

Bradley v. School Bd. of City of Richmond, 317 F.Supp. 555 (E.D. Va. 1970) 7

Brown v. Board of Educ., 349 U.S. 294 (1955) ..... *passim*

Brown v. Board of Educ., 347 U.S. 483 (1954) ..... *passim*

Buckner v. County School Bd., 332 F.2d 452 (4th Cir. 1964) 79

Burleson v. County Bd. of Election Comm'rs., 308 F.Supp. 352 (E.D. Ark.), *aff'd*, 432 F.2d 1356 (8th Cir. 1970) 110

Calhoun v. Cook, 451 F.2d 583 (5th Cir. 1971) 114

Calhoun v. Cook, 332 F.Supp. 804 (N.D. Ga. 1971) 114

Cooper v. Aaron, 358 U.S. 1 (1958) 81

Corbin v. County School Bd., 177 F.2d 924 (4th Cir. 1949) 79

Davis v. Board of School Comm'rs., 402 U.S. 33 (1971) ..... *passim*

Franklin v. Quitman County Bd. of Educ., 288 F.Supp. 509 (N.D. Miss. 1968) 81

Godwin v. Johnston County Bd. of Educ., 301 F.Supp. 1339 (E.D. N.C. 1969) 81

Goins v. County School Bd., 186 F.Supp. 753 (W.D. Va. 1960) .. 79

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 76, 111

Green v. County School Bd., 391 U.S. 430 (1968) ..... *passim*

Griffin v. County School Bd., 377 U.S. 218 (1964) 32

Griffin v. State Bd. of Educ., 296 F.Supp. 1178 (E.D. Va. 1969) .. 65

Hall v. St. Helena Parish School Bd., 197 F.Supp. 649 (E.D. La.), *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam*, 368 U.S. 515 (1962) 111

Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969) 73, 103, 110, 112

Henry v. Clarksdale Mun. Sep. School Dist., 433 F.2d 387 (5th Cir. 1970) 82

Page

James v. Almond, 170 F.Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959) 32

Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971) 110

Lee v. Macon County Bd. of Educ., 267 F.Supp. 458 (M.D. Ala.) (three judge court), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967) 81

Louisiana v. United States, 380 U.S. 145 (1965) 60

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964) 103

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 115

Monroe v. Board of Comm'rs., 391 U.S. 450 (1968) 7, 100

NAACP v. Button, 371 U.S. 218 (1964) 32

National Socialist White People's Party v. Ringers, No. 72-1737 (4th Cir., Feb. 5, 1973) 81

North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971) 50, 103

Northcross v. Board of Educ., 397 U.S. 232 (1970) 104

Raney v. Board of Educ., 391 U.S. 443 (1968) 7

Reynolds v. Sims, 377 U.S. 533 (1964) 76

School Bd. of Warren County v. Kilby, 259 F.2d 497 (4th Cir. 1958) 79

School Town of Speedway v. Dillin, *cert. denied*, ... U.S. ....., 92 S.Ct. 2457 (1972) 114

Smith v. North Carolina State Bd. of Educ., 444 F.2d 6 (4th Cir. 1971) 81

Stout v. Jefferson County Bd. of Educ., 448 F.2d 403 (5th Cir. 1971) 110

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) ..... *passim*

United States v. Board of School Comm'rs., No. 72-1031 (7th Cir., Feb. 1, 1973) 104, 106

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Page

United States v. Board of School Comm'rs., 332 F.Supp. 655 (S.D. Ind. 1971), *aff'd,* No. 72-1031 (7th Cir., Feb. 1, 1973) 73

United States v. E. I. duPont De Nemours & Co., 366 U.S. 316 (1961) 60

United States v. Greenwood Mun. Sup. School Dist., 406 F.2d 1086 (5th Cir.), *cert. denied,* 395 U.S. 907 (1969) 112

United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385, *cert. denied,* 389 U.S. 840 (1967) 81

United States v. Scotland Neck City Bd. of Educ., ... U.S. ....., 92 S.Ct. 2214 (1972) ..... *passim*

United States v. Scotland Neck City Bd. of Educ., 442 F.2d 575 (4th Cir. 1971) 92

United States v. Texas, 321 F.Supp. 1043 (E.D. Tex. 1970), *aff'd,* 447 F.2d 441 (5th Cir. 1971), *cert. denied,* ..... U.S. ..... 92 S.Ct. 675 (1972) 73, 81

Wesberry v. Sanders, 376 U.S. 1 (1964) 76

Wright v. Council of City of Emporia, ... U.S. ....., 92 S.Ct. 2196 (1972) ..... *passim*

Wright v. Council of City of Emporia, 442 F.2d 570 (4th Cir. 1971) 92

Constitutional Provisions

U.S. Const. amend. X 4

U.S. Const. amend. XIV, § 1 ..... 4, 6

Va. Const. art. VIII, §§ 1-7 (1971) 4

Va. Const. art. VIII, § 5(a) (1971) 89

Va. Const. §§ 129-30, 132-33 (1902) 4

Statutory Provisions

0 U.S.C.A. §§ 1601-19 50-51

8 U.S.C. § 47 5

Page

28 U.S.C. § 1254(1) 4

28 U.S.C. § 1343 6

Rule 19, Fed. R. Civ. P., 28 U.S.C. 8

Rule 52(a), Fed. R. Civ. P., 28 U.S.C. 6, 108

42 U.S.C. § 1983 6

Va. Code Ann., as amended (1950):

§ 22-1 4

§ 22-2 4

§ 22-7 ..... 4, 67

§ 22-30 ..... *passim*

§ 22-34 4

§ 22-93 74

§§ 22-100.1 through -100.12 66

§ 22-115.29 65

Va. Code Ann., as amended (1971):

§ 22-1.1 4

§ 22-21.2 4

§ 22-30 ..... *passim*

§ 22-32 ..... 4, 49

§ 22-100.1 ..... 4, 49, 66

§§ 22-100.3 through -100.11 ..... 4, 49, 66

§ 22-126.1 4

§ 22-127 4

Other Authority

Va. Brief for Appellees in No. 3, Davis v. County School Bd., O.T. 1954 32

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BRIEF FOR PETITIONERS

OPINIONS BELOW

he opinions of the United States Court of Appeals for Fourth Circuit are reported at 462 F.2d 1058 and are inted at pp. 557-602 of the Appendix to the Petition Writ of Certiorari seeking review of the judgment filed is Court by Petitioners, the School Board of the City

of Richmond, *et al.*[1] The opinion and order of the United States District Court for the Eastern District of Virginia dated January 5 and 10, 1972, respectively, and reversed by the court of appeals, are reported at 338 F.Supp. 67 and are reprinted at Pet. A. 164-545.

Other related opinions and orders of the courts below are reported or reprinted as follows:

1. Opinion and order dated August 17, 1970, reported at 317 F.Supp. 555 (directing implementation of interim plan of desegregation in Richmond system for September, 1970) (Pet. A. 1).

2. Opinion and order dated December 5, 1970, reported at 51 F.R.D. 139 (directing joinder of various State and County defendants) (Pet. A. 48).

3. Opinion dated January 8, 1971, reported at 324 F. Supp. 439 (denying recusal motions submitted by County defendants) (Pet. A. 58).

4. Order filed January 13, 1971, *nunc pro tunc*, January 8, 1971, unreported (disposing of various pretrial motions, etc.) (Pet. A. 91).

5. Opinion and order dated January 13, 1971, unreported (disposing of various pre-trial motions) (Pet. A. 94).

6. Opinion and order dated February 10, 1971, opinion

[1] A separate appendix containing all relevant opinions and orders below as well as pertinent state constitutional and statutory provisions was filed by the Richmond School Board with its Petition for Writ of Certiorari on October 4, 1972, and all references in this brief to opinions and orders below or to the state provisions will be in the following form: "Pet. A.—". All other matters excepting trial exhibits are printed in separate appendix volumes and will be referred to as "A.—." The appendix volume containing only trial exhibits will be referred to as "Ex. A.—." The various exhibits of each party will be designated as follows: Richmond School Board—"RX——"; Plaintiffs—"PX——"; Chesterfield and Henrico County defendants—"CX——", and "HX——," respectively.

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eported at 324 F.Supp. 396 (denying three judge court) Pet. A. 98).

7. Opinion and order dated February 10, 1971, opinion eported at 324 F.Supp. 401 (denying motion to drop addi-onal parties in individual capacities) (Pet. A. 107).

8. Opinion and order dated April 5, 1971, reported at 25 F. Supp. 828 (directing implementation of desegregation an III in Richmond system for 1971-72 school year) (Pet. 110).

9. Opinion and order dated July 20, 1971, unreported lenying motion to convene three judge court) (Pet. A. 6).

10. Order dated September 15, 1971, unreported (deny-g motion to limit evidence) (Pet. A. 163).

11. Opinion and order dated January 19, 1972, unre-rted (denying stay of January 10, 1972 order) (Pet. A. 6).

12. Order of court of appeals granting partial stay dated bruary 8, 1972, reported at 456 F.2d 6 (Pet. A. 553).

13. The amended judgment of the court of appeals, en-ed August 14, 1972, appears at Pet. A. 603.

Other proceedings in this case are reported as follows: adley v. *School Board of City of Richmond*, 317 F.2d 429 h Cir. 1963); 345 F.2d 310 (4th Cir.), *rev'd and re-nded*, 382 U.S. 103 (1965); 324 F. Supp. 456 (E.D. 1971).

JURISDICTION

The opinion and judgment of the court of appeals was d on June 5, 1972, and its amended judgment was filed August 14, 1972. The jurisdiction of this Court is in-

voked pursuant to 28 U.S.C. § 1254(1). By an order dated August 12, 1972, Mr. Justice Douglas granted an extension of time to file the petition for a writ of certiorari from September 5, 1972, to and including October 5, 1972. The petition for a writ of certiorari was filed in this Court on October 4, 1972, and was granted on January 15, 1973.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the tenth amendment to the Constitution of the United States, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

This matter also involves the equal protection clause of the fourteenth amendment to the Constitution of the United States, which provides as follows:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Various provisions of Virginia's 1902 and 1971 constitutions and statutes relating to education which are also relevant to this matter are set out at Pet. A. 604-23: constitution of 1902, §§ 129, 130, 132, 133; constitution of 1971, art. VIII, §§ 1-7; Va. Code Ann. §§ 22-1, -2, -7, -30, -34, -100.1 through -100.12 (Repl. Vol. 1969); Va. Code Ann. §§ 22-1.1, -2, -7, -21.2, -30, -32, -100.1, -100.3 through -100.11, -126.1, -127 (Cum. Supp. 1972).

QUESTIONS PRESENTED

1. Under what circumstances the remedial powers of a district court may be limited by existing school division boundaries.

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2. The extent to which the effectiveness of relief in de jure metropolitan communities may be dependent upon the manner in which a state may choose to align its local school divisions.

3. Whether, in the formulation of effective relief, district courts are permitted to utilize means coextensive with those used by school authorities in the past to establish and perpetuate a statewide system of dual schools.

STATEMENT

1. Introduction

This Court has granted review of an en banc[2] decision of the United States Court of Appeals for the Fourth Circuit reversing the judgment and order of District Judge Robert R. Merhige, Jr., of the Eastern District of Virginia, which had directed the implementation of a desegregation plan encompassing three Richmond metropolitan area school divisions. The district court had ordered the consolidation of the Henrico and Chesterfield County school divisions with the school division of the City of Richmond, substantially in accordance with existing provisions of state law, as "a first, reasonable and feasible step toward the eradication of the effects of the past unlawful discrimination" practiced by the state and local school authorities involved (Pet. A. 239). In the majority opinion written by Judge Craven, however, five members of the court of appeals concluded that the district judge had exceeded his authority in that, regardless of the relative effectiveness of alternative desegregation plans presented, the remedial

[2] As was indicated when the case first came to the court of appeals on motions for a stay of the district court's order (Pet. A. 553-56), Judge Butzner disqualified himself pursuant to 28 U.S.C. § 47 since, as a United States district judge, he had presided over the case from 1962 to 1967 (Pet. A. 554).

power of a district court could not extend beyond existing school division lines absent findings of discriminatory purpose or motivation in the establishment or maintenance of such lines[3] or of joint interaction by any two of the three school divisions involved for the purpose of keeping one system relatively white by confining blacks to another[4] (Pet. A. 562, 572). Judge Winter, however, viewed the lower court's decree as embodying the only relief permissible under the fourteenth amendment and would have affirmed (Pet. A. 586).

2. Proceedings Below

This case is an outgrowth of the Richmond school desegregation suit originally filed by black parents and students in 1961, pursuant to 28 U.S.C. § 1343, 42 U.S.C. § 1983, and section 1 of the fourteenth amendment of the Constitution of the United States[5] (A. 59-69). The current phase of

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[3] As discussed at pp. 97-100 *infra*, the district court did, in fact, make such findings to which the court of appeals apparently assigned no importance.

[4] In reaching this conclusion, the court of appeals failed to find as clearly erroneous under Rule 52(a), Fed. R. Civ. P. any of what the district court had viewed as operative facts established by largely uncontradicted evidence, but in some instances substituted its conclusions as to the inferences to be drawn therefrom. This action on the part of the appellate court is discussed more fully at pp. 104-09 *infra*.

[5] The case was first tried during 1962 at which time the plaintiffs sought transfers of pupils from Negro public schools to white public schools and, on behalf of all persons similarly situated, an injunction restraining the Richmond School Board from operating racially segregated schools. The district court approved the individual transfers but refused to grant further injunctive relief and the plaintiffs appealed. The court of appeals reversed the order in part, holding that plaintiffs' class were entitled to an injunction restraining the Richmond School Board from maintaining a discriminatory "feeder" system which in effect had perpetuated segregated schools. (317 F.2d 429 [1963]). Again, in 1965, the court of appeals upheld a district court order approving what was in effect a limited freedom of choice plan. (345 F.2d 310 [1965]). This Court, however, vacated the order of the court of appeals and remanded the case for consideration of

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the litigation began in March of 1970 when the plaintiffs, relying upon decision which this Court had rendered nearly two years previously,[6] again sought the desegregation of the Richmond public school system.

Pursuant to the plaintiffs' motion, a series of hearings was conducted during June and August of 1970 by District Judge Robert R. Merhige, Jr., who entered his initial judgment (317 F. Supp. 555; Pet. A. 1) finding that the Richmond system was still illegally segregated under freedom of choice in that the various facilities were as to student population and staffs readily identifiable as either black or white schools[7] (Pet. A. 7-8). Even though the plan submitted by the Richmond School Board at this time was found to be deficient in certain respects,[8] Judge Merhige nevertheless accepted it as an interim measure for the 1970-71 school year while at the same time requiring the School Board to come forward with another plan at a later date[9] (Pet. A. 38-41).

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allegations relating to discriminatory faculty allocations, specifically noting that more than a decade had passed since its decision in *Brown v. Board of Education*, 349 U.S. 294 (1955) [hereinafter cited as *Brown II*], and that delays in desegregation of school systems could no longer be tolerated (382 U.S. 103, 105 [1965]). During the school years 1966-67 through 1969-70, the schools in the City of Richmond were operated under a freedom of choice plan pursuant to a consent decree entered by the district court in March of 1966.

[6] Green v. County School Bd., 391 U.S. 430 (1968); Monroe v. Board of Comm'rs., 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968).

[7] In his opinion, Judge Merhige made extensive findings regarding the existence and effects of de jure segregation within the City of Richmond alone (Pet. A. 8-13).

[8] See p. 37 *infra*, noting the district court's dissatisfaction with the degree of segregation remaining in the City's elementary schools under the Richmond Board's plan.

[9] The Richmond public schools were operated under the "Interim Plan" for the duration of the 1970-71 school year in that the district court on January 29, 1971, declined to order any further relief in the middle of the school year. 324 F. Supp. 456.

With the implementation of the "Interim Plan" in September, 1970, however, the City school system experienced a 300 per cent increase in the normal rate of attrition of its white students. Stating that complete and effective relief could not be provided within the City alone, the Richmond School Board on November 4, 1970, filed a motion under Rule 19, Fed. R. Civ. P. to compel the joinder of parties needed for a just adjudication with a view of presenting a plan of desegregation which would encompass the major portion of the Richmond metropolitan area[10] (A. 90-97). Hearings were conducted regarding this new aspect of the case following which the district court on December 5, 1970, granted the Richmond School Board's motion and directed the plaintiffs to file an amended complaint[11] (51 F.R.D. 139; Pet. A. 48).

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[10] Dr. Thomas C. Little, Associate Superintendent of the Richmond Public Schools, as early as June 25, 1970, had testified on cross examination that the solution to the problem would involve an area larger than the City school division:

> Q. Dr. Little, assuming transportation of pupils, is there any way to achieve what you consider to be, as an educator, an optimum of desegregation in the Richmond area? A. In the Richmond area, yes.
>
> Q. How would you do that? A. It would involve the involvement of a larger area than the present city boundaries of the City of Richmond.
>
> Q. Are you talking about Henrico County, Chesterfield County, or both? A. Henrico County, Chesterfield County, and the possibility of the general metropolitan area, maybe bordering on, in other counties other than Henrico and Chesterfield. Basically, the problem could be solved within the City of Richmond, Henrico and Chesterfield Counties.

[6/25/70 Tr. 1122-23].

[11] In noting the objections of the additional defendants to the effect that their joinder was unnecessary in view of earlier findings regarding the sufficiency of a desegregation plan confined to the City, the district court stated that such a determination was

> . . . made in the context of litigation between Richmond residents and Richmond officials alone. It is by no means inconsistent with

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This the plaintiffs accomplished on December 14, 1970, by filing an amended complaint wherein certain portions of the original complaint as initially filed in 1961 and amended in 1962, including the basis for federal jurisdiction in the matter as previously noted at p. 6 *supra,* were specifically realleged (A. 99-109). The prayer was stated in the alternative, as the plaintiffs requested relief through either

> the consolidation or merger of the defendant school systems . . . [or]
>
> . . . that the Court require [the] defendants . . . to enter into such agreements, contracts or otherwise to provide for the joint operation of the educational systems of the [three divisions], with free availability of all facilities for pupil attendance, and tri-system-wide assignment of pupils . . . .

(A. 107-08).

Numerous motions, hearings and district court orders intervened prior to the trial of the matter which did not

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the existence of a duty on the part of officials with broader powers, to exercise such powers to afford different or additional relief from what the Court has found to be State imposed segregation. The addition of further parties, moreover, alters the range of alternatives, some of which may be shown as feasible and more promising in their effectiveness. *Green v. County School Board of New Kent County* [citation omitted]. It is with an eye to this range of choices between means to provide desegregated schools that the legal sufficiency of a proposed unitary plan is to be tested.

(Pet. A. 50-51).

The specific defendants eventually joined under the district court's order and the plaintiffs' amended complaint were as follows: The Virginia State Board of Education and the individual members thereof; the State Superintendent of Public Instruction; the School Boards of the Counties of Chesterfield and Henrico and the individual members thereof; the Division Superintendents of schools of Chesterfield and Henrico Counties; and the Boards of Supervisors of the Counties of Chesterfield and Henrico and the individual members thereof (A. 55-56). These parties collectively will be referred to as the "State and County defendants."

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commence until mid-August of 1971.[12] Evidence was received in the lower court on August 16-20, 23-27, 31 and September 1-2, 7-10 and 13, 1971.[13]

Even though the metropolitan phase of the case had been substantially advanced, the Richmond School Board still was under an outstanding order of the district court to come forward with an additional desegregation plan limited to the City schools for the 1971-72 school year.[14] On April 5, 1971, Judge Merhige ordered the Richmond Board to implement its "Plan III" for the 1971-72 school year within the City (325 F. Supp. 828; Pet. A. 110). Since the metro-

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[12] On January 4, 1971, the County defendants filed a motion for recusal and joined with the State defendants in moving for a dismissal of the amended complaint. At the January 8, 1971 hearings on these motions, at which time Judge Merhige delivered his opinion denying the recusal motion (324 F. Supp. 439; Pet. A. 58), the State and County defendants submitted a number of additional motions. On January 13, 1971, the district court issued orders disposing of many of these pre-trial motions and directing the State and County defendants to answer the amended complaint (Pet. A. 91; 94). All defendants submitted answers to the amended complaint on January 15, 1971, and the Richmond School Board in conjunction with its answer filed a cross-claim reasserting allegations made in its motion for joinder and specifically requesting relief in the form of consolidation of the Richmond, Chesterfield and Henrico school divisions. On February 10, 1971, the district court entered its memorandum opinions and orders denying State and County motions for a three judge court and for the dropping of parties in their individual capacities (324 F.Supp. 396, 401; Pet. A. 98; 107). Other pre-trial motions submitted by the State and County defendants were subsequently disposed of by Judge Merhige on July 20 and September 15, 1971 (Pet. A. 156; 163).

[13] At the conclusion of the presentation of its evidence, the Richmond School Board on August 26, 1971, filed a motion for leave to amend its answer and cross-claim (A. 721-26) which was subsequently granted under the terms of the district court's final decree (Pet. A. 536).

[14] Pursuant to a report submitted to the district court in November of 1970, the Richmond School Board on January 15, 1971, filed alternative plans for the additional desegregation of the City schools for the coming school year. Hearings on the proposals were conducted in the lower court on March 4, 1971.

olitan phase of the case was then pending, the district ourt was careful to note that its decision was "based upon e assumption that the city will [in 1971-72] operate as it as heretofore, as a single administrative unit for school urposes" (Pet. A. 110) (footnote omitted). Judge Merhige rther noted that his conclusions were made entirely with- ut consideration of the issues involving the State and ounty defendants previously joined in the metropolitan hase of the case (Pet. A. 110 n. 1), and cautioned that his pproval of the Richmond plan was conditioned upon its timate effectiveness as "[t]he Constitution is satisfied only hen an integration plan 'works' in practice and not merely n paper"[15] (Pet. A. 148-49) (citation omitted).

Concurrently with the trial of the issues involving the etropolitan relief, the Richmond School Board was open- g its schools under "Plan III." Once again in September, 971, attendance data established a substantial acceleration white attrition within the Richmond system in that of e approximately 17,500 white students anticipated to en- ll, only 13,260 actually were in attendance. The Septem- er, 1971, enrollment data available to the district judge rior to his ruling in the instant case indicated that many Richmond's schools, particularly those which traditionally ad been all-black schools, opened with proportionately

[15] At the time of the district court's action in April of 1971, it had ly projections for student attendance upon which to base its judg- ent regarding the ultimate effectiveness of "Plan III" in eliminating e racial identifiability of City schools. As the court said in approving e plan:

> A comparison of the projected racial attendance figures for each school with the systemwide ratio reveals that . . . the School Board, *if this proposal succeeds as planned,* will have eliminated the racial identifiability of each facility to the extent feasible within the City of Richmond. . . .

Pet. A. 121) (emphasis added).

greater black enrollments than had been projected[16] (RX-98; Ex. A. 155).

On January 10, 1972, Judge Merhige issued his opinion (338 F.Supp. 67; Pet. A. 164-536) and filed his order (Pet. A. 536) directing the September, 1972 implementation of the Richmond School Board's metropolitan desegregation plan which embodied the consolidation of the school divisions of Richmond, Henrico and Chesterfield substantially in accordance with provisions of State law.[17] The district court based its order on extensive findings of discriminatory practices including the following illustrative determinations that:

(1) "the 'desegregation' of schools within the city and the counties separately [was] pathetically incomplete" and that "[n]ot only [was] the elimination of racially identifiable facilities impossible of attainment, but the partial efforts taken contain[ed] the seeds of their own frustration" (Pet. A. 237);

(2) State and local officials had "by their actions directly contributed to the continuing existence of the dual school system which now exists in the metropolitan area of Richmond" (Pet. A. 379);

(3) "desegregation of the schools of the city and the counties as well cannot now be achieved within the current school division bounds" owing in substantial part to the deliberate deferral by the state and local authorities of plaintiffs' constitutional rights (Pet. A. 207);

(4) the minmum size school district required "to eliminate the effect of state-imposed segregation, would be that of the division created by the merger of the

[16] The effect of this disparity between projected and actual attendance of students in the Richmond system is illustrated more graphically at pp. 23-25 *infra*.

[17] These provisions are discussed at note 51 *infra*.

systems of Richmond, Henrico and Chesterfield" (Pet. A. 434);

5) "[t]he school division lines here . . . have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system" (Pet. A. 193);

6) "[t]he existing [political subdivision lines] have no relation to natural obstacles or substantial governmental interests, but they are related to strict housing segregation patterns, maintained by public and private enforcement and owing their genesis in substantial part to the manner in which the three school divisions have been operated and expanded. Thus by the maintenance of existing school division lines the State advantages itself of private enforcement of discrimination and prolongs the effects of discriminatory acts of its own agents" (Pet. A. 195-96);

7) "[t]he proof here overwhelmingly establishes that the school division lines between Richmond and the counties here coincide with no natural obstacles to speak of and do in fact work to confine blacks on a consistent, wholesale basis within the city, where they reside in segregated neighborhoods" (Pet. A. 196); and

8) regarding the school construction policies of the three school divisions, "[t]he longer term impact of [these policies] has been the exaggeration of the racial disproportion between the city and the two neighboring counties. This has come about by virture of the maintenance of school division lines as obstacles to pupil assignment for purposes of desegregation while the area's housing patterns, when its population grew, became increasingly segregated. The continued operation of the schools of each subdivision as racially identifiable facilities moreover necessarily caused each new school and

> old ones as well to take on the label of a black or white school." This process led to the racial identifiability of the entire systems in issue, with the Richmond system being identifiable as a black one, and that of each county perceivably a white system (Pet. A. 200-01).

Motions for a stay of the district court's order were sought in that court and denied by Judge Merhige on January 19, 1972 (Pet. A. 546). Enlarged applications for a stay[18] were renewed in the court of appeals on January 25, 1972, and that court by order dated February 8, 1972, granted a partial stay of Judge Merhige's order pending its disposition of the case on an expedited appeal (456 F.2d 6; Pet. A. 553). Under the terms of the partial stay issued by the court of appeals, the State defendants were required to direct and coordinate planning for the operation and financing of the merger of the Richmond, Chesterfield and Henrico school divisions as contemplated in the district court's order (Pet. A. 553). Planning for the implementation of that order thus was conducted at the State level for at least the four month period from early February, 1972, until the time of the decision of the appellate court.

Following arguments before the court of appeals on April 13, 1972, that court, on June 5, 1972, filed its opinion and judgment reversing the district court's order (462 F.2d 1058; Pet. A. 557), Judge Winter dissenting (Pet. A. 585).[19] The amended judgment of the court of appeals was entered on August 14, 1972 (Pet. A. 603).

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[18] These applications on behalf of the State and County defendants contained the first intimations that those parties apparently preferred, as an alternative to the consolidation ordered by the district court, a method of assignment based on an exchange of pupils between the three subsisting school divisions (A. 1346-48). See note 49 *infra* and accompanying text.

[19] The opinions of the court of appeals are discussed at pp. 92-115 *infra*.

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3. Characteristics of the Richmond Metropolitan Area

A.
Geography, Demographic Patterns And General Interdependence

The City of Richmond, along with the Counties of Henrico and Chesterfield form the major part of the Richmond Standard Metropolitan Statistical Area.[20] The City of Richmond (63 square miles) occupies the approximate geographical center of the region, while the Counties of Henrico (244 square miles) and Chesterfield (445 square miles) completely surround and are contiguous with the City at all points. There are no distinct geographical features or man-made barriers[21] which separate the City from either Henrico or Chesterfield (A. 151-52; Pet. A. 401-02, 195).

The Richmond, Henrico and Chesterfield metropolitan area covers a total of 752 square miles, and according to

[20] As of 1963, the Census Bureau included Hanover County as a part of the Richmond SMSA, which is thus currently composed of the four political subdivisions. At no point is Hanover County contiguous with the City of Richmond, and the substantial part of the County is largely rural in nature. Approximately 9,600 students, 78 per cent of whom are white, attend schools in the Hanover system which number is relatively small in comparison to the enrollments in the other three political subdivisions in the Richmond SMSA. In 1967, consultants commissioned by Henrico and Chesterfield to study the Richmond area noted the substantially lesser degree of interdependency between Hanover and the other three components of the Richmond SMSA (HX-25; II-1 n. 1; A. 834; Ex. A. 41).

[21] The boundary line separating the City of Richmond and Henrico County, last changed pursuant to a 1942 annexation (CX-2 [map]; A. 878), was characterized in a 1959 report by an independent consultant studying the Richmond region as "so irregular and complex that it often confuses even veteran service personnel of both jurisdictions" (RX-89, IV-2; A. 821-22).

The same consultant's 1959 conclusions regarding a more clearly defined boundary as between the City and Chesterfield County are no longer valid since, pursuant to a 1970 annexation, the new Richmond-Chesterfield line now conforms to no significant features or barriers and thus is similarly indistinct (A. 151).

the 1970 Census contains a total of 480,840 persons. Richmond's population totaled 249,621 while the totals for Henrico and Chesterfield were 154,364 and 76,855, respectively (Pet. A. 401-02). The great majority of Henrico and Chesterfield citizens live in the urban-suburban portions of the respective Counties most closely contiguous with the City of Richmond and are easily within thirty minutes travel of the heart of downtown Richmond, using regular streets and observing applicable speed limits (A. 154-56; RX-60; Ex. A. 13).

The district court found that there is a substantial community of interest and general interdependence between citizens in Richmond, Henrico and Chesterfield as demonstrated by such indices as area-wide employment, retail sales, commuter traffic patterns and inter-jurisdictional utility services. Recreational, educational, cultural, transportation and hospital facilities used by the metropolitan population are concentrated largely within the City of Richmond. The City is the central economic element in the region as it is the major place of employment, the center of commerce, as well as the situs of the majority of area manufacturing activity and retail sales (Pet. A. 402-16).

Prior to the 1970 annexation of a portion of Chesterfield County by the City of Richmond,[22] over 75 per cent of the jobs (covered by the State's unemployment program) in the tri-jurisdictional area were in Richmond (A. 159-60, 162; RX-54, 54A; Ex. A. 1-3; Pet. A. 402). The 1967 census data, the most recent available at the time of the proceedings below, indicated that Richmond contributed 76 per cent of the value added by manufacturing in the region (A. 162-63;

[22] As of January 1, 1970, an area of approximately 23 square miles of Chesterfield containing over 47,000 persons, 97 per cent of whom were white was awarded to Richmond pursuant to an annexation decree (A. 878; Pet. A. 411).

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X-54, 54A; Ex. A. 1-2; Pet. A. 402), and that in 1970 re- sales, Richmond accounted for 62.5 per cent of the area's siness (A. 163; RX-54, 54A; Ex. A. 1-2). Further data licated that a substantial percentage of employed Chester- d and Henrico residents come into the City to work.[23] (A. 0-61; RX-56, 56A; Ex. A. 5-6).

Evidence introduced at the trial below further indicated substantial degree to which all major public and semi- blic facilities of a recreational, educational and cultural iety are located within Richmond (A. 163-65; RX-59; A. 9-12). Of the hospitals serving the area, 17 of 18 are Richmond (RX-59; Ex. A. 9-12), and data compiled the years 1965-1969 demonstrated that most area resi- nts are born in and die within city facilities (A. 165; X-61, 61A; Ex. A. 15-16).

The division of the community by three political jurisdic- ns has not altered the mutual interdependence which per- s in various protective and utility services. Since Hen- o County's principal offices are located within the City, hus relies upon Richmond's fire and police departments service (A. 805-06), and a reciprocal fire protection as- ance agreement presently exists between Richmond and

[23] Even though the 1970 census data on employment and place of dence was not available at the time of the trial, 1968 information Chesterfield showed that prior to the 1970 annexation, approxi- ely 48 per cent of Chesterfield workers had jobs within the City, e 1963 data on Henrico demonstrated that 66 per cent of Henrico kers came into Richmond to work (A. 160-61; RX-56, 56A; Ex. 5-6). Additional evidence introduced at the trial, however, showed in two selected employments the respective percentages in were equally significant. Of all attorneys listed in the 1970 Greater mond Telephone Directory, over 90 per cent had their offices in the City; of the number working in Richmond, 42 per cent d in the two Counties, 51.4 per cent resided in Richmond and per cent elsewhere (A. 161). Approximately a third of the loyees of the State Department of Education which is head- rtered in Richmond lived in each of the three jurisdictions (A.).

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Chesterfield (A. 877). Richmond and Henrico have entered into numerous contracts concerning the provision by the City of water and sewerage treatment facilities (A. 187-91; Pet. A. 414-15), and similar reciprocal compacts have been made by Richmond and Chesterfield (A. 191-94).

The conclusions reached by the district court regarding the marked interdependence and community of interest between the three jurisdictions were substantially identical to those reached by separate independent consultants who have studied the region over the past 14 years (Pet. A. 402-05).

Financed by the Richmond Regional Planning Commission, the Public Administration Service Report of 1959 included: (1) findings that the area's residents shared a common heritage and had common interests; (2) comments concerning the disadvantages in the operation of each of the school systems on a separate basis and the need for unified management of the region's public education;[24] and (3) proposals that governmental consolidation be effected between Richmond and Henrico through a recommendation that "Henrico County and Richmond City combine their governments for the common and mutual benefit of the citizens of both" [25] (RX-89, IV-3; A. 820-22).

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[24] With regard to the existence of the three separate school systems in the Richmond region, the consultants concluded:

> With each school operation going its separate way, optimum efficiency in management and best planning, location, and utilization of the expensive school plants are difficult, if not impossible of achievement. Whatever may be the outcome of the current controversy over public education in Virginia, it does not seem likely that it will result in the scrapping of the $60 million school plant that now exists in the Region, or in the discontinuance of its expansion and its need for unified management.

(RX-89, II-25; Ex. A. 34-35).

[25] Such a consolidation, of course, necessarily would have included the school systems of the two jurisdictions.

A report prepared in 1967 at the request of the Boards of Supervisors of Henrico and Chesterfield by Space Utilization Associates likewise incorporated a recognition by independent consultants of the need for solution of local problems on an area-wide basis through the elimination of many of the jurisdictional limitations imposed by the existing governmental structure in the area (RX-47; A. 825-26; HX-25; A. 834; Ex. A. 36, 41; Pet. A. 404-05).

The initial version of this report[26] contained the following observations:

> The central city is an essential element of the region as the major place of employment, the center of commerce, and the State Capital and consequently its problems affect the entire region. The other jurisdictions cannot dictate the affairs of the central city nor can they refuse to cooperate in the solution of its problems. . . . .
>
> * * *
>
> The jurisdictional boundaries of the three jurisdictions do not necessarily coincide with the living patterns of area residents or natural service areas. Many of the problems associated with urban areas cross over artificial boundaries and cooperative action or multijurisdictional programs must be mounted to cope with crime, disease, pollution, etc. Jurisdictional boundaries are not inviolate and should be changeable when warranted . . . .

(RX-47, IV-1; Ex. A. 37, 38). A recommendation concerning the ultimate solution for future government in the Richmond area was expressed in the following terms:

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[26] Certain portions of the report originally submitted by the consultants on June 1, 1967 (RX-47; Ex. A. 36), were not well-received by the County Boards of Supervisors who commissioned it (Pet. A. 404). Accordingly, certain passages were deleted and a later version dated June 12, 1967 (HX-25; Ex. A. 41), was submitted to the County Boards (Pet. A. 404).

> It is the Consultant's opinion that consolidation would be the "idealized" solution for the Richmond region, but that, without a change in attitudes or a crisis of major proportions, it would not receive the necessary voter approval.

(RX-47, V-5; Ex. A. 39).

Although the "idealized" solution through consolidation was excluded in the report which finally met with the approval of the County Boards of Supervisors, the later version (June 12th edition) nevertheless contained significant observations regarding indices such as the social and economic disparities between Richmond and the two Counties.[27]

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[27] In describing conditions in the Richmond region, the consultants rendered opinions as to the future situation if certain remedial actions were not taken:

> Much more must be done in education, from pre-school through high school education and vocational training. All officials and all levels of government must participate in the improvement of education for the Negroes and in developing employment opportunities that permit growth and full utilization of aspirations, education, and abilities.
>
> A continually growing concentration of the Negroes without improvements in housing, education, and opportunities will further increase the disparities between the central city and the suburbs, making cooperative regional action more difficult in eradicating the disparities.
>
> Henrico does not have a high percentage of low income families. The percentage of non-whites in the population is lower than the national average and lower than any other jurisdiction in the SMSA. In contrast to all other jurisdictions in the region, the number of non-whites in Henrico decreased between 1950 and 1960. If current trends continue, there seems little likelihood of any significant social or economic disparities between economic or racial groups within the County.
>
> Chesterfield has a very low percentage of lower income groups, though the percentage has been increasing. Due to the recent development of the County, most of the dwelling units are relatively new. There are few low rent facilities. For this reason, no significant change is anticipated in the number of low income families. For the same reason, the percentage of non-whites in the County is expected to remain almost constant.

(HX-25, III-2, 4, 5; Ex. A. 47-48).

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Examining measures of "social distance" extant in the Richmond metropolitan area, the consultants observed:

> . . . as the percentage of non-whites in the core city *increases*, the possibility of effective cooperation to solve metropolitan problems diminish [*sic*]. In city-suburban racial imbalance and other measures of social distance, the Richmond area is worse off (the social distance between city and suburb is greater) than most other metropolitan areas in the State of Virginia, the southern region, and the United States as a whole.

Let us look at some measures of social distance.

A. *Percentage of Non-Whites*

In 1960, 42 percent of the City's population was non-white. This was by far the highest non-white percentage among Virginia's SMSA's; it is almost three times the median figure for metropolitan areas in the United States; and it is almost twice the median figure for the Southern region.

In contrast, the 1960 percentage of non-whites in the counties surrounding Richmond was only 10.4 percent. This figure was lower than the Southern regional figures. It was also 39 percent lower than that of the figure for the City of Richmond.

And there is every reason to believe that life in the Richmond metropolitan area is becoming *more* segregated with time, rather than less segregated. By that we mean non-white populations are continuing to be concentrated in the City of Richmond, and the small non-white percentages in Henrico and Chesterfield counties are likely to become even smaller with time as the white population in these counties continues to expand. At the present time there is little reason to believe that the State of Virginia or the U. S. Government is likely to adopt legislation, such as a "fair housing act", which would significantly alter this pattern of concentrating Negro housing in central cities and white housing in suburbs.

B. *Education*

The median education level in the City of Richmond in 1960 was 10.1 years. This figure, which increased only 0.2 years in the decade 1950-1960, was *lower* than every other Virginia SMSA except Lynchburg, was lower than the U.S. SMSA median and, more importantly, was lower than comparable levels for SMSAs in the Southern region.

In contrast, the median education level in Henrico and Chesterfield was 12.2 years in 1960. This level was the highest of the State's SMSAs, higher than the U.S. SMSA median, higher than the median level in the Southern SMSAs, and most importantly, was 2.1 years higher than the City of

The percentage of the total black population in the Richmond metropolitan area remained stable over the 30-year period from 1940 (28 per cent) to 1970 (26 per cent). In 1970, however, approximately 84 percent of the metropolitan black population was confined within the City of Richmond. During the respective periods of greatest growth in the Counties, from 1940 to 1960 in Henrico, and from 1960 to 1970 in Chesterfield, the total number of black residents in each area decreased. (RX-57A; A. 158-59; Ex. A. 8).

B.

PATTERNS OF RACIAL COMPOSITION OF METROPOLITAN AREA SCHOOLS, 1954-1971

(1)

Richmond Schools

During the 1954-55 school year, Richmond enrolled 35,857 students with a racial composition of 20,259 white (56.5 per

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Richmond. While the City's educational figure increased only 0.2 in the 1950-1960 period, Henrico's figure increased 1.2 years and Chesterfield's increased 2.0 years.

The City had a smaller proportion of high school graduates than other Virginia cities, smaller than the average of all U.S. cities, and smaller than the average of all Southern cities. In contrast, Richmond's suburbs had a higher percentage of high school graduates than the suburbs of other Virginia cities, higher than the average of all U. S. schools, and higher than the average of all Southern suburbs.

(HX-25, IV-2, 3, 8; Ex. A. 48-50).

Finally, the consultants recommended remedial action in the following terms:

> Governmental action alone cannot resolve all of the regional problems; all sections of the regional community must participate in the elimination of the social and economic disparities that exist between the central city and the suburbs. This is most lucidly illustrated by the failure of most public housing efforts to realize the perhaps too lofty expectations set for them. Educational opportunities must parallel housing improvements.

(HX-25, V-4; Ex. A. 50).

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cent) and 15,598 black (43.5 per cent) students (R. Tr. A-142; RX-75; Ex. A. 21; Pet. A. 417). From 1954-55 through 1966, the school facilities within the City of Richmond remained all-white or all-black in a manner identical to enrollment patterns prior to 1954.

In September of 1969, the racial composition of the Richmond school system was 70.5 per cent black and 29.5 per cent white (RX-75; Ex. A. 21; Pet. A. 416).

In the thirteen-month period from September, 1970, to mid-September, 1971, during which City school officials implemented two desegregation plans, approximately a third of the white student enrollment which originally had been expected to attend Richmond schools in the beginning of the 1970-71 term had left the system (RX-98; Ex. A. 155; Pet. A. 417).

As a result of the annexation of a portion of Chesterfield by the City of Richmond which, for school purposes, did not become effective until the end of the 1969-70 school year, the City system anticipated a significant influx of white students for the 1970-71 term.[28] In planning for the opening of its schools in September of 1970 under the newly approved "Interim" desegregation plan, the Richmond School Board thus anticipated a racial mix of 60 per cent

[28] A number of Chesterfield County schools ranging in student enrollment from 92 to 100 per cent white became a part of the Richmond system pursuant to the annexation decree. A total school population of approximately 8,135 students, 97.5 percent of whom were white, was included within the territory annexed by the City of Richmond. Since there was not sufficient space in the school buildings acquired by the City to house all of the student population living within the annexed area, under the terms of the decree approximately 3,500 students were to remain in Chesterfield schools at the beginning of the 1970-71 school year. Of this 3,500, all elementary students were to enter Richmond schools in September of 1971, with secondary pupils enrolling in September, 1972. Thus, of the total number of pupils gained pursuant to the annexation, more than 4,500 were to have enrolled in the City school system as of September, 1970 (R. Tr. A-143-44; Pet. A. 178).

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black and 40 per cent white, but of the 20,400 whites expected, only 17,203 actually enrolled (RX-75; Ex. A. 21; Pet. A. 167, 417). During the 1970-71 school year under its first plan of substantial desegregation, the Richmond system was 64.2 per cent black and 35.8 per cent white (RX-75; Ex. A. 21; Pet. A. 417).

Based on the pupil membership during the 1970-71 school year, a student population of 63 per cent black and 37 per cent white was projected for the 1971-72 school year as the Richmond system prepared to operate under "Plan III." After two weeks of school in September, 1971, however, the student enrollment in the Richmond system reflected a total of 42,423 pupils with a racial composition of 69 per cent black and 31 per cent white. Of the 17,462 white student enrollment which had been projected for that year, only 13,260 actually had enrolled (RX-98; Ex. A. 155; Pet. A. 417).

Over the period from the 1954-55 school year through the 1969-70 school year, the white student population in the Richmond system fell roughly 40 per cent from a total of 20,259, or 56.5 per cent to a low of 12,622 or 29.5 per cent (RX-75; Ex. A. 21; Pet. 416-17). Even with the addition of a substantial number of white students pursuant to the 1970 annexation, the white student enrollment in the Richmond system as of September, 1971, was rapidly approaching the 1969 low.

During the corresponding period, the black student population in the Richmond system increased from 15,598 to 30,097, or nearly a 100 per cent rise over the fifteen-year span (RX-75; Ex. A. 21; Pet. A. 417).

As of September, 1971, the Richmond system with a racial composition of 69 per cent black and 31 per cent white, operated 56 facilities of which 49 were majority black. Twenty-five of these schools were in excess of 70 per

black and of those, 11 were in excess of 80 per cent
k (RX-98; Ex. A. 155). Richmond high and middle
ols such as Walker, Armstrong, Kennedy, Mosby and
ves and elementary schools such as Baker, Blackwell,
mount, Mason and Norrell which had been built and
ned as all-black schools and which had remained all-
k through 1969-70, ranged from 72 to 88 per cent black
971-72 notwithstanding the successive implementation
xtensive plans of desegregation (RX-98; Ex. A. 155).
ecause of primary reliance on neighborhood zoning from
to 1970, a period during which the City's black student
ulation was doubling, Richmond blacks continued to
nd schools that were segregated in a manner identical
onditions which existed in 1954. The first significant
gregation of these historically all-black schools under-
n in September of 1970 and 1971, accompanied by a
of nearly 35 per cent of the City's white students, left
17,700 or nearly 61 per cent of the City's black pupils
hools which were in excess of 70 per cent black (RX-98;
A. 155).

(2)

Chesterfield Schools

the school year 1953-54, Chesterfield enrolled 9,132
ents with a racial composition of 7,429 white (79.6 per
) and 1,903 black (20.4 per cent) students (Pet. A.
.

uring the 1961-62 school year, there were 85.1 per cent
e and 14.9 per cent black students attending Chester-
schools, whereas, by the 1970-71 school year, the pupil
ulation of Chesterfield was 90.6 per cent white and 9.4
cent black. Over that nine-year period, the total pupil
bership rose from 15,596 to 24,063 even though Ches-
ld lost approximately 8,000 students to the City of

Richmond pursuant to the 1970 annexation (RX-76; R. Tr. A-145; Ex. A. 24).

During the 1970-71 school year, in contrast to the City's operation of 25 facilities in excess of 70 per cent black, the 12 Chesterfield facilities closest to the City were all between 95 and 100 per cent white[29] and over half of all Chesterfield schools were in excess of 90 per cent white (Pet. A. 524-26, 530-32).

For the 1971-72 school year, Chesterfield enrolled a total of 23,754 students with a racial composition of 21,588 white (90.9 per cent) and 2,166 blacks (9.1 per cent) students (Pet. A. 418).

Over the period from 1953-54 school year through 1971-72, the overall percentage of blacks in the Chesterfield school system thus fell from 20.4 per cent to 9.1 per cent.

(3)

Henrico Schools

In 1953-54, Henrico schools enrolled 13,142 students with a racial composition of 11,771 white (89.6 per cent) and 1,371 black (10.4 per cent) students (Pet. A. 418).

In 1970-71, the pupil population in Henrico was 91.9 per cent white and 8.1 per cent black. Over the ten-year period from 1960-61 to 1970-71, the Henrico pupil population rose from 24,059 to 34,470 (RX-77; R. Tr. A-146; Ex. A. 25; Pet. A. 417).

During the 1970-71 school year, in contrast to Richmond's 25 facilities in excess of 70 per cent black, all Henrico facilities except Central Gardens Elementary (96.2 per cent black) were in excess of 70 per cent white and over two-thirds of Henrico's schools were in excess of 90 per cent white (Pet. A. 527-29, 530-32).

[29] See Chesterfield schools listed at note 33 *infra*.

ring the 1971-72 school year, Henrico enrolled 34,317
nts in 43 facilities with a racial composition of 31,299
(91.2 per cent) and 3,018 black (8.8 per cent) stu-
(Pet. A. 417).

the period from 1953-54 to 1971-72, the over-all per-
ge of blacks in the Henrico school system thus fell from
per cent to 8.8 per cent.

C.

RICHMOND METROPOLITAN SCHOOLS

1961-62 the combined Richmond, Henrico and Ches-
d school divisions enrolled a total of 82,761 students
a racial composition of 54,948 whites (66.4 per cent)
7,813 blacks (33.6 per cent). In June of 1971, there
a total of 106,521 students attending schools in the
divisions with an over-all racial composition of 70,664
s (66.3 per cent) and 35,857 blacks (33.7 per cent)
78; R. Tr. A-146; Ex. A. 26; Pet. A. 418). Although
otal number of students attending schools in the com-
area over the past ten years has increased by nearly
0, the over-all racial composition of the three divisions
aried only one-tenth of one per cent which contrasts
ly with the substantial shifts in the racial compositions
separate divisions (RX-78; Ex. A. 26). The Rich-
system has shifted from 57.9 per cent white in 1953-
a current figure of 70 per cent black, while the County
ns over a corresponding period have experienced sub-
al increases in white student enrollment and decreases
over-all percentage of black student enrollment.[30]

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[30] During the period 1955-1970, white student enrollment in both
o and Chesterfield increased by approximately 37,000 (RX-
; Ex. A. 24, 25; Pet. A. 418). In the same general period,
ond experienced a near 100 per cent rise in black enrollment
osing approximately a third of its white pupils from September,
o September, 1971.

Speaking in terms of a single metropolitan school system, the Richmond, Henrico and Chesterfield area during the 1971-72 school year served approximately 103,000 students in 132 schools with an over-all racial composition of approximately 65 per cent white and 35 per cent black students (Pet. A. 417-18).

As of June, 1972, there were approximately 35,000 black students in the Richmond, Henrico and Chesterfield systems of whom 29,747 or 85 per cent attended schools within the City of Richmond. Over 62 per cent of the 29,747 or about 18,500 black students attended 26 City schools which were in excess of 70 per cent black. These 26 City schools served approximately 53 per cent of all black students in the Richmond, Henrico and Chesterfield metropolitan area[31] (Pet. A. 416-18, 530-32). In contrast, the County systems during the 1970-71 school year operated a total of 46 facilities which were 90 per cent or more white (Pet. A. 524-29).

For many years, Richmond, Henrico and Chesterfield have participated in joint programs designed to meet the educational needs of the entire metropolitan school community which could not otherwise have been made available by any of the divisions on a separate basis.[32]

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[31] The June, 1972 student enrollment figures for the City are reflective of data submitted to the district court by the Richmond School Board as of the end of September, 1971, as opposed to the September 7, 1971 figures contained in RX-98, Ex. A. 155. The lower court's figures (Pet. A. 417-18) as well as its compilation for the City system in 1971-72 (Pet. A. 530-32) also reflect the later enrollment report.

[32] Currently, pupils from Richmond, Henrico and Chesterfield are being transported by school buses provided by each of the three divisions to joint schools as follows: (1) branches of a cooperative training center for mentally retarded children, one of which is in northern Henrico and another of which is located in the area which Richmond gained from Chesterfield pursuant to the 1970 annexation; (2) a math-science center also located at the same facility in northern Henrico; and (3) a technical center located within the City of Richmond (A. 417-20; Pet. A. 358).

The Richmond School Board operates two facilities located wholly, in the case of Kennedy High School, or partly, in the case of Fairfield Court Elementary, in Henrico County. Both schools historically have had all-black student enrollments (Pet. A. 388).

There are a number of instances where substantially black Richmond schools and nearly all-white Henrico or Chesterfield schools are located only short distances from one another[23] (Pet. A. 428-29).

During 1970-71, the math-science center at one time or another served a total of 8,872 students from Chesterfield, 10,469 from Henrico and 11,399 from Richmond—most of whom were regularly transported on an inter-jurisdictional basis in order to attend programs at this particular facility (A. 419-20). The same process occurred with regard to the operation of the technical center which normally serves 700-800 pupils per year (A. 420).

[23] The following comparisons are illustrative of this phenomenon:

Richmond Schools 1970-71	Henrico Schools 1970-71	Distance Miles
Kennedy High School 93% black	Henrico High School 96.1% white	4.9
John Marshall High School 73% black	Henrico High School 96.1% white	1.4
Mosby Middle School 95% black	Fairfield Junior High School 81.9% white	3.6
East End Middle School 68% black	Fairfield Junior High School 81.9% white	3.6
Fulton-Davis Elementary 53% black	Montrose Elementary 100% white	1.8
Mason Elementary 100% black	Adams Elementary 86.4% white	3.1
Highland Park Elementary 90% black	Glen Lea Elementary 99.8% white	1.3
Stuart Elementary 91% black	Laburnum Elementary 79.6% white	2.2

In addition both Kennedy and Mosby, two of the City's most heavily black secondary schools in 1970-71, are from approximately two-to-four miles of the following Henrico elementary schools: Ratcliffe—100% white; Montrose—100% white; Glen Lea—99.8% white; and Adams—86.4% white (RX-64-66; Ex. A. 27-31). While precise

4. State and Local Policies and Practices Insuring Maintenance of Segregated Schools Throughout Sixteen-Year Period Following Brown I

Both the Richmond School Board and the plaintiffs presented detailed evidence in the district court concerning the magnitude and continuing effects of racial discrimination in the operation of public schools as it has been practiced by the State and local school authorities both prior to and after this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) [hereinafter cited as *Brown I*]. This evidence not only concerned discrimination in pupil assignments, but also involved discriminatory practices in school site selection and construction policies, discriminatory allocation of faculties in the individual systems, as well as a myriad number of policies and programs deliberately designed to perpetuate racial segregation which continued

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mileage was not measured as between Richmond schools and those in Chesterfield nearest to the City-County boundary, a glance at the maps utilized by the Richmond School Board in presenting its plan for metropolitan desegregation (RX-64-66; Ex. A. 27-31) clearly shows that the following Chesterfield schools are within two-to-four miles, or closer, from various Richmond schools and virtually ring the City's southern boundary:

Chesterfield Schools	Racial Composition 1970-71
Robious Road Elementary	98.6% white
Bon Air Elementary	97.5% white
Crestwood Elementary	99.8% white
A. M. Davis Elementary	96.9% white
Providence Intermediate School	97.6% white
Manchester High School	94.8% white
Chalkley Elementary	95.5% white
Hening Elementary	100 % white
Meadowbrook High School	97.3% white
Falling Creek Elementary	100 % white
Falling Creek Intermediate School	97.2% white
Bensley Elementary	99.4% white

(Pet. A. 524-26).

he time of the trial below. Detailed evidence also was
ted supporting the following lower court findings:
ne desegregation of schools within each of the three
divisions was pathetically incomplete at the time of
arings in this case (Pet. A. 237); that the State and
lefendants had failed to utilize powers possessed under
law to eradicate the vestiges of the dual system of
s in the face of actual knowledge of the consequences
n inaction (Pet. A. 233-35, 258-59); that the opposi-
n the part of State and local officials to assignments
lents across existing school division lines for the pur-
f school desegregation was, at least in part, racially
ated (Pet. A. 212, 230, 258); and that the State and
authorities had promoted segregation through the
ment of pupils across existing school and political sub-
n boundaries as well as through the employment of
oles underlying the consolidation of school districts
A. 193-95, 352-56).

district court analyzed the voluminous evidence be-
and made exhaustive findings of fact both in its earlier
ns relating to the Richmond phase of the case (Pet.
110) and with regard to the metropolitan phase in
uary 5th opinion (Pet. A. 164). Although many of
findings were based on uncontradicted evidence, the
of appeals made no reference to the substantial ma-
of them.[24]

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e appellate court, however, did agree with Judge Merhige's
that there had been both state and federal action within the
Richmond tending to entrench and perpetuate patterns of
egregation throughout the City (Pet. A. 572). The court also
with the district court's finding that there had been state
within the Counties of Henrico and Chesterfield as well which
d the location of black residences (Pet. A. 572).

A.

STATE POLICIES AND PRACTICES

In contrast to the court of appeals' reliance upon Virginia's so-called tradition of local control of its public schools, the lower court made significant findings establishing extensive control at the state level in the administration of various programs designed to perpetuate segregated schools both prior to[35] and well beyond 1954[36] (Pet. A. 313-31). Findings were made regarding the deep implication of the State school authorities in the administration of programs divesting the localities of all control over pupil assignments and involving as well the movement of students across school division lines in order to insure the perpetuation of the dual system of schools[37] (Pet. A. 313-31).

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[35] In 1954, the Virginia Attorney General told this Court that: "In general, education in Virginia has operated in the past pursuant to a single plan centrally controlled with regard to the segregation of the races." (Brief for Appellees in No. 3, Davis v. County School Bd., O.T. 1954, at p. 15).

[36] Of course, this case, as did those arising from North Carolina, Georgia and Alabama which were characterized in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5-6 (1971) as coming from "states having a long history of maintaining two sets of schools in a single system deliberately operated to carry out a government policy to separate pupils in schools solely on the basis of race . . ." arises as well from a State which historically has been indefatigable in its efforts to perpetuate segregated public schools. *See, e.g.*, Brown v. Board of Educ. I & II, 347 U.S. 483 (1954), 349 U.S. 294 (1955); NAACP v. Button, 371 U.S. 415, 435 n. 16 (1963) (noting voluminous list of Virginia school desegregation cases with postscript that despite such effort, at that time "only ½ of 1% of Virginia's Negro public school pupils attend[ed] school with whites"); Griffin v. County School Bd., 377 U.S. 218 (1964); Bradley v. School Bd., 382 U.S. 103 (1965); Green v. County School Bd., 391 U.S. 430 (1968); Wright v. Council of City of Emporia, U.S. , 92 S.Ct. 2196 (1972); *see also* Adkins v. School Bd., 148 F.Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957); James v. Almond, 170 F.Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959).

The district court found that the purposeful, centrally ompelled policy of segregation was vigorously pursued in ie State of Virginia for many years subsequent to this ourt's 1954 declaration of the illegality of laws requiring gregation in public education, and that the enduring ef-cts of this policy were manifested in the racial character-ics of the schools (Pet. A. 258). The district judge noted at even at this late date, the abandonment of such a sition had been gradual, piecemeal, intentionally reluctant d was less than total (Pet. A. 258). Judge Merhige further und that during this entire period, the State Board of ducation had dutifully and hastily communicated to local hool authorities the most recent State enactments de-gned to frustrate desegregation; whereas, by contrast, ring the years from 1965 to date, during which the State ard in order to avoid the cutoff of federal funds had exe-ted a compliance agreement with HEW, it had failed to sseminate to local school authorities the substance of even e most important decisions of this Court in the area of hool desegregation[25] (Pet. A. 350). The district court found

[25] The details of some of these programs as set out in the district urt's opinion may be highlighted as follows: a series of memoranda the State Superintendent of Public Instruction to local school thorities and State Board of Education resolutions advising of the opriety of continued operation of segregated schools following this ourt's directives in *Brown I* and *Brown II* (Pet. A. 314-16); the sting of the power of enrollment of pupils in the centrally-controlled pil Placement Board (Pet. A. 313-14, 318-20); procedures authoriz-g the State through the office of its Governor to assume control over d close any school which either voluntarily or under court order came integrated (PX-144-I; Pet. A. 316-18, 533-36); and the ntralized administration of programs designed to fund intra- or ter-divisional transfers of students in the interest of avoiding at-ndance at schools which had become integrated (Pet. A. 320-31).

[26] A deputy superintendent in the State Department of Education as assigned the task of administering the State's compliance with e Civil Rights Act of 1964. Prior to the passage of the Act in July, 64, no one in the State Department of Education had been re-

that for the major part of the 17-year period from *Brown I* to date, the State of Virginia's primary and subordinate agencies with authority over educational matters had devoted themselves to the perpetuation of a policy of racial separation in the public schools (Pet. A. 215).

As a result of these State practices and policies, each of the three school systems in the Richmond area, and indeed, others throughout Virginia, remained virtually segregated even after the adoption of court-ordered or HEW-induced freedom of choice plans. Still, there was no more than token

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quired to assume any responsibility concerning desegregation (A. 680; Pet. A. 332). During the following years the State Department's efforts in securing local compliance were confined solely to passing various data between HEW and the local divisions (A. 678-93). Even this minor role, however, had its limits as was evidenced in a memorandum written in 1969 by this particular deputy superintendent concerning a government request for information on certain Virginia school divisions wherein it was suggested that the State deny having data that was, in fact, available (A. 681-83; RX-87; Ex. A. 82; Pet. A. 344-45). Advice concerning the State's role in the process was offered as follows:

> I do not think it is sound, politically or otherwise, for the Department to assume the role of a coercive collection agency for the Federal government in instances where local school systems refuse to supply the information and are willing to forego Federal aid. The Federal government has ample authority to exercise over localities if it desires to institute suit through the Justice Department to place such localities under Court ordered desegregation plans. It would be ill advised, in my judgment for our Department to align itself with the Federal government in this confrontation. . . .

(RX-87; Ex. A. 82-83; Pet. A. 346). This individual could recall few instances where the State Department of Education had advised local school authorities of relevant court decisions and was unable to produce any such notification of this Court's action in *Green v. County School Bd.*, 391 U.S. 430 (1968) (A. 717-20; Pet. A. 350).

Even though funds had been available for nearly five years, the State Department of Education failed to apply for any federal grant under the technical assistance (in desegregating local divisions) program until late 1970 (A. 576-77; Pet. A. 348-49).

tion, and in 1968-69 in the Counties and 1969-70 in
ty, all of the traditionally black schools remained all-
Pet. A. 524-32).

erimposed over the lack of any substantial desegrega-
the Richmond community during the sixteen-year
following *Brown I* was the rapid increase of white
ts in the Chesterfield and Henrico systems, and the
r cent growth of the black student population of the
The continued use of pre-*Brown* criteria in the selec-
f school sites coupled with the use of neighborhood
,[39] thus caused the further solidification of patterns
egation in the community.[40]

use of the State's "defiance of the announced consti-
l mandate," and the inevitable effect of such policies
racial characteristics of Richmond area schools, the
court concluded that

]he task of disestablishing the dual system may there-
re be much more difficult in 1971 [and that] [t]he de-
ndants ought not to benefit from such self-imposed
ardships.

Against this background the "desegregation" of
hools within the city and the counties separately is
athetically incomplete. *Not only is the elimination
racially identifiable facilities impossible of attain-
ent, but the partial efforts taken contain the seeds of
eir own frustration.*

A. 237) (emphasis added).

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ese processes are discussed more fully at pp. 45-47 *infra.*

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1
71), where in the context of the Charlotte metropolitan area,
urt recognized that the process of greatly expanding school
y for white students in the suburbs while at the same time
ing white schools to black schools within the central city had
. . . a potent weapon for creating or maintaining a state-segre-
hool system." *Id.* at 21.

At the same time the State school authorities were adhering to the foregoing policies through either action or inaction on their part, the various school and governmental officials in the Richmond metropolitan area also were actively discriminating against blacks in education, housing and employment.

B.

LOCAL POLICIES AND PRACTICES

(1)

Richmond

In his initial opinion in the Richmond phase of the case on August 17, 1970, Judge Merhige included a detailed set of findings indicating the degree to which freedom of choice had failed to remove the racial identity of the substantial majority of the public schools within the City system (Pet. A. 6-8). Also included within that opinion were extensive findings on the magnitude of illegal residential segregation as it existed within the City and its interrelationship with school segregation (Pet. A. 8-13). Judge Merhige specifically found that prior State laws which had required racial segregation in housing and schools, had long term effects which had not been diminished by the earlier lifting of the formal restrictions (Pet. A. 10).

Thus, even though matters pertaining to the desegregation of the Richmond system had been litigated throughout the 1960's, by the end of the 1969-70 school year approximately 43,000 students were enrolled in schools within the City which were segregated in virtually the same manner as they had been in 1954.[41] Neither had faculty and staff desegre-

[41] As of May 1, 1970, seven high schools were operated within the City of which three were 100 per cent black, three were 99.3 per cent, 92 per cent, and 81 per cent white and the remaining one was 68 per cent black. Also, at that time on the middle school level, two 100 per cent black schools, three others that ranged from 99.9 per

on been accomplished (Pet. A. 7-8). The district court cluded that there was little doubt that Richmond "had achieved a unitary system as required by law" (Pet. A.

s noted at p. 7 *supra*, the district court in approving Richmond School Board's first significant plan of de-egation for the 1970-71 term, cautioned that the plan d be operated only on a temporary basis owing to the tantial number of virtually one-race schools remaining ne elementary level. During the 1970-71 year, approxi-ely 9,000 blacks in the City system attended thirteen ols which were at least 90 per cent black; additionally, mond operated four all-white elementary facilities (Pet. 6).

(2)
Chesterfield

hesterfield schools were operated on a completely segre-d basis for at least twelve years following this Court's sion in *Brown I*. During the school years 1966-67 through 9-70, the student body at one of the County's secondary ols was 100 per cent black and its faculty over 90 per black, while during the 1968-69 school year there were schools with all-black student enrollments even though ks in Chesterfield represented only 10 per cent of the nty's total school population (Pet. A. 524-26). In of 1968, Chesterfield was threatened with the termi-on of all federal aid owing to a deficient plan for de-egation of its schools, and only then did Chesterfield

to 69 per cent black, and three that were over 91 per cent white operated within Richmond. On the elementary level, seventeen schools were 100 per cent black, four others were in excess of per cent black, two were 100 per cent white, and thirteen others ed upward from 90 per cent white (Pet. A. 6).

authorities propose a plan of desegregation which was not to take effect until September of 1970 (Pet. A. 382).

In the 1970-71 school year, Chesterfield operated six elementary schools which were in excess of 99 per cent white with two of these being 100 per cent white; at the same time three of Chesterfield's secondary facilities were in excess of 97 per cent white (Pet. A. 524-26). Also at this time and against the background of a system that was less than 10 per cent black, the Matoaca Lab Elementary facility which had been operated jointly with Virginia State College remained at 99 per cent black even though it was within reasonable pairing distances of Bensley and Curtis, two virtually all-white schools (Pet. A. 384-85, 526). As late as August 20, 1971, Chesterfield received and transmitted State funds to Virginia State College for the support of Matoaca Lab School which at that time remained an all-black facility. Additionally, Chesterfield provided bus transportation for pupils attending that school (Pet. A. 386).

In 1969-70 there were nine Chesterfield County schools without a single black on their faculty, while during the same year 14 facilities including three of County's largest high schools had only one black faculty member (Pet. A. 524-26). Throughout the 1970-71 school year, six Chesterfield facilities were without any black faculty members and nine schools had only a single black on their staff (Pet. A. 524-26). By way of contrast, in the same year the Matoaca Laboratory School in Chesterfield had a 100 per cent black faculty (Pet. A. 384, 526).

The district court also made extensive findings regarding the general discrimination which persisted in all aspects of Chesterfield practices and policies of which the following are representative: it maintained a number of inferior all-black schools even during the 1960's, and black administrators were often demoted upon the closing of such schools

A. 380-82, 377); the Chesterfield County governing had, as late as five years after the *Brown I* decision, its opposition to any integration of schools whatsoever rged State authorities to hold the line against school ation (Pet. A. 379); through the 1969-70 school year, rfield operated an all-black secondary school whose ance zone constituted the entire County (Pet. A. in 1971, a Chesterfield political leader openly called County residents to revolt rather than participate in integration involving that County and the City of ond"[42] (Pet. A. 412-13); Chesterfield County has had blic housing authority and has made it clear that it desire for any low-income housing projects;[43] public

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rtly after this Court's decision in *Swann v. Charlotte-Mecklen-d. of Educ.*, 402 U.S. 1 (1971), the Chairman of the Board of sors of Chesterfield County publicly recommended to his con-s:

revolt in the form of a school boycott, separate private school stem, or even freedom of choice school assignments and letting deral troops see what they can do about it, rather than inte-ate the schools in Chesterfield County with the City of Rich-ond . . .

-68, 671; Pet. A. 412). He clarified his statement by explaining nen *Swann* was decided Chesterfield citizens were "fit to be nd that he had reacted in such a manner because he was ng the feelings of the people of his political jurisdiction (A. . A. 413). This individual further related his belief

at firm action by the people was necessary to indicate and ow that they were not pleased with the way that conditions re going and the un-Americanism that they believed was tak-g place because this Charlotte-Mecklenburg case of course ade the people afraid that their community schools would be stroyed.

).

poenaed as a witness by the plaintiffs, the Executive Director Richmond Redevelopment and Housing Authority testifying gard to both Chesterfield and Henrico stated in effect that o the scarcity of available sites in Richmond that it would be elpful" for his authority to obtain County locations for low

employment in Chesterfield over the years has been available most exclusively to whites (PX-107B-C; R. Tr. M-46; Ex. A. 91; Pet. A. 510); most Chesterfield administrative jobs are manned entirely by whites, with blacks occupying at best menial positions (PX-107B-C; Ex. A. 86; Pet. A. 514); and blacks in Chesterfield have settled in small, contiguous cells rather than in any widely dispersed pattern throughout the County as a whole (Pet. A. 511).

(3)

Henrico

Henrico schools as well were totally segregated well into the mid-1960's. A major secondary school which served the

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rent housing (A. 612, 616). Questioned if he had considered the possibility of obtaining sites in those areas, the witness further testified as follows:

> A. We have discussed a number of times the possibility of approaching the two counties regarding some authorization to undertake development in the counties, but have not done so.
>
> Q. Why is that, sir? A. Two reasons. One was that we saw almost no likelihood of success; secondly because of the existing tensions between the City and county groups.
>
> Q. What was the basis for seeing no reasonable possibility of success? A. County officials had declared their position, particularly in the case of Chesterfield, in no uncertain terms. We saw no likelihood of success on that account.
>
> Q. Is there authority for the expansion—for the construction of projects outside the city limits by the Richmond Public Housing Authority if it had the approval of the surrounding jurisdiction? A. Yes. It is the state law that contemplates this possibility in two or three different ways.
>
> Q. And can the housing problem in this area be solved without the cooperation of these suburban counties? A. I don't believe it can be solved without metropolitan cooperation.
>
> Q. Because of the difficulty you have had in terms of both acquiring new sites and rejections of sites in apparently predominantly white areas, is there any realistic possibility of location of governmental housing, disestablishing the existing pattern of residential racial segregation in the Richmond community? A. If I understand your question, I don't think so.

(A. 616-17).

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County remained all-black until it was closed at the the 1968-69 school year (Pet. A. 389). In September 6, Henrico school authorities informed State school ities that the County would not cooperate with HEW matter of faculty desegregation (Pet. A. 343). The uthorities took no action upon this notification, and 3 were advised by HEW that federal funds for the o school system were being terminated owing to its submitted an inadequate and ineffective plan for olishing the elimination of its dual school system . 344). Only in the face of pending HEW enforce- roceedings did Henrico finally adopt a desegregation hich was not to commence until September of 1969 A. 393). Pursuant to its new plan, Henrico at the ng of the 1969-70 school year closed five formerly k schools and black principals were generally de- o lesser jobs (Pet. A. 393-94).

ng the 1970-71 school year, Henrico still operated 14 lementary facilities with a racial composition of 99 t or more white with six of these remaining 100 t white (Pet. A. 529). Against the background of that was less than 10 per cent black, Henrico school ties the same year placed 40 per cent of the County's lack elementary enrollment in one school, Central s, which was more than 96 per cent black and ne-to-two miles of all-white elementary schools (Pet. 529). This concentration was not alleviated until e commencement of the trial below (Pet. A. 395-96), method used placed the principal burden of trans- n upon the black students attending grades 1-5 at Gardens." At least six of Henrico's elementary

Superintendent of Henrico Schools testified as to the details lan used to desegregate Central Gardens Elementary which mplemented until after the commencement of the trial below

schools, Crestview, Lakeside, Montrose, Ratcliffe, Sandston and Holladay which were built as all-white schools were still 100 per cent white during the 1970-71 term. Henrico also operated Tuckahoe Junior High which was 98.6 per cent white and Freeman High School, the County's largest containing nearly 2,000 students, remained 99.3 per cent white during the 1970-71 school year (Pet. A. 527-29).

Even though the Superintendent of Henrico Schools admitted that one of the indicia of racial identifiability was the faculty composition of a particular school (R. Tr. H-89),

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(A. 591-95). Central Gardens had gone from 62.6 per cent black in 1966-67 to over 96 per cent black in the 1970-71 school year. During that same time Henrico operated a number of elementary facilities, all-white or nearly so since their opening, which were located in close proximity to Central Gardens:

School	*1966-67*	*1967-68*	*1968-69*	*1969-70*	*1970-71*	*Distance from Central Gardens*
Central Gardens (black)	62.2%	78%	91%	95%	96.2%	
Ratcliffe (white)	100%	100%	100%	100%	100%	1 mi.
Glen Lea (white)	100%	100%	98.1%	100%	99.8%	2.4 mi.
Adams (white)		97.4%	96.5%	86.3%	86%	3.4 mi.
Highland Springs (white)	99.3%	99.6%	99.3%	95.3%	99.6%	8.5 mi.

(A. 589-91; Pet. A. 529). The plan adopted by Henrico required all students in grades 1-5 at Central Gardens (these were nearly all blacks) to be transported out to the other facilities listed above; in turn, all 6th graders from those schools were to be transported to Central Gardens (A. 592, 595). The resulting racial composition in each school was approximately 70% white and 30% black (A. 592), and the Henrico Superintendent expressed the hope that these ratios would insure stability in the racial compositions of the schools involved (A. 595). Even though the burden of transportation was thus placed on the youngest black pupils, the Henrico Superintendent nevertheless saw the plan as educationally sound and feasible (A. 593-94).

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numerous Henrico schools during the period from 1966-67 through 1970-71 were without any black faculty members whatsoever (Pet. A. 397). During the 1969-70 term, four Henrico schools had no black faculty members while 23 facilities had only one black on their respective faculties (Pet. A. 527-29). In the 1970-71 school year the number of Henrico facilities without any black faculty members had increased to nine, while there were still 21 schools which had only one black member apiece (Pet. A. 527-29).

The planned reassignment of faculty in an effort to eliminate the racial identifiability of many of the Henrico schools was not undertaken until after the County officials had been joined as parties in this case (Pet. A. 397). During the 1971-72 school year, 25 facilities in Henrico had only one black faculty or staff member, and the district court was unable to determine how many of these were classroom teachers (Pet. A. 397).

Similar to its extensive findings of general discrimination in Chesterfield the district court made the following conclusions regarding Henrico: HEW officials had charged in the early part of 1968 that Henrico had made insufficient progress toward school desegregation in that County school authorities were maintaining small inadequate all-black schools and the program at the all-black secondary school was demonstratively inferior to those being offered at other schools in the system (Pet. A. 392); housing patterns in Henrico were segergated, and the blacks that were able to move into that County settled principally into small colonies (Pet. A. 506); Henrico County has had no public housing authority or programs, nor any rent supplement programs[45]

[45] See note 43 *supra*. One of the witnesses at the trial below, a black citizen of Henrico, told how he had attempted (and failed) to get County approval for low cost housing because he felt that "Henrico County could not indefinitely dump their unfortunate families on Richmond" (A. 472).

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(Pet. A. 510); and public employment in Henrico over the years has been available almost exclusively to whites (PX-104-107A; Ex. A. 85; Pet. A. 510).

C.

STATE AND LOCAL DISCRIMINATION IN SCHOOL SITE SELECTION AND CONSTRUCTION

In discussing the role of the State school authorities in the maintenance of policies and programs of school site selection and construction, the district court found that decisions on school locations as well as the expansion of existing facilities in the three metropolitan systems were matters for central as well as local control (Pet. A. 210). The district judge further found that the approval of State school authorities was required for the site selection for any new facility by the various localities (Pet. A. 284). Not until 1968 did the State school authorities caution all local superintendents to consider the effect on desegregation of new school construction; however, this advice was never incorporated into State procedures for review of construction proposals, and the contribution that each new proposal would have made to the elimination of the dual school system was not considered (Pet. A. 286). Current State Department of Education regulations concerning school facility site selection do not, in either recommendations or binding regulations, refer to desegregation (Pet. A. 289).

Throughout the period from 1954 to 1971, each of the school divisions with the support and authorization of the State school authorities pursued programs and policies of discriminatory school site selection and construction (Pet. A. 204-07). The district court's findings with regard to City practices have been detailed elsewhere.[46] With regard

[46] See Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456 (E.D. Va. 1971).

Henrico and Chesterfield systems, the district judge
finding that new school construction was planned
ck schools years after *Brown I* without regard to the
ity of accommodating the black pupil population in
chools (Pet. A. 204).

Superintendent of Chesterfield schools was unaware
1968 memorandum distributed by the State school
ties, and the district court found that none of the
field schools including those under construction at
e of the trial had been planned with a view toward
g the desegregation of the various County schools
a strategic location of the site (A. 494; Pet. A.
The district court also concluded that Henrico school
ties had, without exception, likewise ignored de-
tion requirements in planning and constructing new
(Pet. A. 298-301).

result of these programs and policies pursued at both
nd local levels, the district court concluded that the
ation of the racial identifiability of the particular
s while each system expanded by means of the crea-
new schools planned for one race or the other, had
assisted in the continuation of prevailing housing
tion which, coupled with the continued use of neigh-
l zoning, further entrenched existing school segrega-
Pet. A. 207). Judge Merhige concluded that such
onstruction policies contributed substantially to the
segregated conditions within each of the three school
and specifically found that the longer term impact
ame policy had been the accentuation of the racial
ortion between the City school system and those of

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note 40 *supra* and accompanying text.

the two Counties[48] (Pet. A. 200). In viewing the over-all process, the district court found that the continued operation of the schools of each subdivision as racially identifiable facilities necessarily caused each new facility and old ones as well to take on the label of a "black" or "white" school, and that this process had led to the current racial identifiability of the entire systems in issue—the Richmond City system identifiable as black, and that of each County as white (Pet. A. 200-01).

The district judge in making the above findings regarding the extensive discrimination which had been practiced by the various State and local agencies from the period following this Court's decision in *Brown I* up until the trial of this matter, concluded that the long years of the maintenance of the dual system, as well as the massive and effective State-managed efforts to oppose desegregation under free choice assignment plans had caused more and more facilities in the

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[48] While each of the Counties were constructing new white schools in their most urbanized areas contiguous to Richmond, City schools were at the same time being converted from white to black facilities as established black neighborhoods expanded. During this period such a policy and other practices as well produced obvious disincentives for blacks looking to relocate in the suburbs; while building new schools for whites, both Henrico and Chesterfield even in the mid-to-late 1960's were operating small inadequate black schools which were demonstratively inferior, see pp. 37-38, 43 *supra;* through June of 1969, Henrico was operating an all-black secondary school in its northern sector which necessitated the transportation of blacks, some for substantial distances, from all parts of the County (A. 587-88; Pet. A. 389); through June of 1970, Chesterfield maintained an all-black secondary facility whose attendance zone likewise was comprised of the entire County (A. 492; Pet. A. 383); and the housing and employment available for blacks in each of the Counties was severely limited, see pp. 39-40, 43-44 *supra.*

Such conditions were no doubt recognized by the County-retained consultants, see p. 19 *supra,* who in their initial report submitted on June 1, 1967, found that ". . . the attitudes and practices of the counties and their residents . . . contributed to the high and growing percentage of Negroes in the central city" (RX-47, I-3; Ex. A. 36).

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a to become segregated by a process of white withdrawal
l black occupation (Pet. A. 230). These factors together
h forces containing blacks in the City, were found to
e produced a community school system divided into ra-
lly identifiable sectors by political boundaries (Pet. A.
). In discussing the rapid progression of racial dispro-
tion between the City and each of the County systems,
lge Merhige found that the desegregation of Richmond
well as Henrico and Chesterfield schools could not be
ieved within the current school division boundaries owing
substantial part to the long and continued deferral of
ntiffs' constitutional rights which had been deliberately
cticed on the part of the appropriate State and local au-
rities (Pet. A. 207).

5. Desegregation Plan Approved By District Court

When it initiated the metropolitan phase of this case, the
hmond School Board advised that it was preparing a
egregation plan for all schools in the Richmond metro-
tan area. The amended complaint filed by the plaintiffs
suant to the lower court's order of December 5, 1970,
uded a specific request that the district court require all
ndants to prepare and submit a desegregation plan for
combined divisions as well as a prayer for relief through
consolidation of the three systems, or alternatively,
ugh a contractual exchange of pupils between the sepa-
divisions. See p. 9 *supra*. In spite of ample oppor-
ty however, none of the State and County defendants
gested any desegregation plan in lieu of the one developed
ne City school authorities[42] (Pet. A. 359). The Richmond

[42] As early as April of 1971, in an attempt to avoid delays in the
t the plan proposed by the Richmond School Board were ulti-
ly approved, the district court advised the State and County de-
ants to confer with the City school administration for purposes of

School Board's metropolitan desegregation plan was thus the only one before the district court at the time of its decision.[50]

The plan itself embodied most of the tools of desegregation specifically approved by this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) [hereinafter cited as *Swann*]. The plan envisioned the consolidation of the Richmond, Henrico and Chesterfield school divisions into a single entity which would be administered and operated by a centralized school authority pursuant to provisions of State law many of which have existed at least since 1954[51] (Pet. A. 430).

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resolving problems incident to the implementation of the metropolitan desegregation plan which City authorities were then preparing (A. 136-42). During the trial in the lower court, however, it became apparent that neither the State nor County defendants had expended any effort or time in suggesting improvements to the plan or in developing any alternative proposals (A. 1009-11). It was not until after the record in this matter had been transmitted to the court of appeals that the State and County defendants in applying for a stay in that court suggested an alternative method of assignment involving a contractual exchange of pupils between the three school divisions (A. 1346-48).

[50] At the time of his decision, Judge Merhige made it clear that he stood ". . . ready at any time to consider any proposed modifications to the plan to be approved" (Pet. A. 519). He further stated in his order that the State defendants could submit ". . . any . . . modifications, changes or recommendations, as may be desired. . ." (Pet. A. 541).

[51] Under laws in effect prior to July 1, 1971, at which time the revised constitution of Virginia and its implementing legislation became effective, the State Board of Education had the unfettered power to create school divisions comprised of more than one political subdivision (§ 22-30; Pet. A. 607). The effect of this action *alone* would have been to place two or more divisions under one superintendent for administrative purposes, with each of the divisions retaining a separate school board (A. 943). Had the Richmond, Henrico and Chesterfield school divisions been so combined, the Superintendent of Chesterfield schools admitted in the trial below that the extreme disparities in the student racial compositions as between the City and County components would have likely necessitated some form of remedial action (A. 494-95).

During the pendency of the proceedings below, however, the statu-
y provision was amended so as to restrict the previous power of the
ite Board of Education to divide the State into school divisions
nprised of more than one political subdivision (A. 941-43, 949). An
icial of the State Department of Education admitted that the
islature was no doubt conscious that the amendment might have
effect on this case (A. 942). The State Board, acting pursuant
the new statute, in fact, redrew all school division lines in the
ite as of July 1, 1971 (RX-83; R. Tr. F-150; Ex. A. 67; Pet. A.
)-81).

Now under the current law, the State Board of Education may
only upon the request of the school boards with the concurrence
the governing bodies of the affected school divisions in consolidating
otherwise altering such divisions (§ 22-30; Pet. A. 617). Where a
gle school division comprising more than one political subdivision
s been created in this manner, the supervision of such a division
ıst be vested in a single school board and a division superintendent
ected by that board (§§ 22-100.1, -32; Pet. A. 617-18). Current
ite law also requires adherence to a definitive scheme of school
ard representation and administration and operation of a school
ision composed of more than one political subdivision. Specific
visions govern:

> (1) the composition, appointment and terms of members of a school board of a division composed of two or more political subdivisions (§ 22-100.3; Pet. A. 618); (2) the qualification and duties of the consolidated division board members (§ 22-100.4; Pet. A. 610); (3) The corporate status of such a board and its general powers (§ 22-100.5; Pet. A. 610); (4) the compensation of the board members (§ 22-100.6; Pet. A. 620); (5) the transfer of title to school property (§ 22-100.7; Pet. A. 620); (6) the State Board's responsibility for promulgating rules and regulations for the financial plan of operation of the consolidated division schools (§ 22-100.8; Pet. A. 611); (7) the formula for the allocation of operating costs, capital outlay and the incurring of indebtedness for school construction (§ 22-100.9; Pet. A. 621); (8) the designation of the fiscal agent for the consolidated division (§ 22-100.10; Pet. A. 612); and (9) the effective date for the formation of the board and its assumption of the supervision and operation of all schools within the consolidated division (§ 22-100.11; Pet. A. 612).

th the exception of the statute requiring local initiative and con-
t, the district court in its January 10, 1972 order specifically di-
ted that the creation and operation of the single school division
sisting of the City of Richmond and the Counties of Henrico and
esterfield be accomplished in conformity with these provisions of
ginia law (Pet. A. 538-40).

Current Virginia school laws contain no affirmative requirement
t a school division conform to political subdivision boundaries.

Under the Richmond metropolitan desegregation plan, the entire area would be divided into six geographical subdivisions (A. 197; RX-64; Ex. A. 27) each with a student population varying from approximately 17,000 to 20,000[52] (Pet. A. 430, 432). Certain administrative and curriculum decisions would be delegated to a separate board for each subdivision (A. 197; Pet. A. 430).

The plan would eliminate all one-race schools in the Richmond metropolitan area with resulting racial compositions ranging from 17 to 40 per cent black. No school in the Richmond, Henrico and Chesterfield division would have a racial composition substantially disproportionate to the over-all composition of the area-wide school population (65 per cent white and 35 per cent black). As a starting point in the development of the metropolitan plan, the Richmond School Board utilized this over-all ratio in attempting to formulate an effective remedy.[53] Evidence tendered during

[52] The exception to this general configuration is subdivision 6 which is comprised of the southern portion of Chesterfield County, a relatively sparsely populated area containing approximately 9,000 students (A. 205; RX-64; Ex. A. 27; Pet. A. 419). Concerning the over-all size of the consolidated school division as well as the approximately 104,000 pupils (1971-72 total enrollment in the three subdivisions was 101,318 [Pet. A. 417-18]) it would contain, Judge Winter noted that Virginia had six school divisions each encompassing more than 700 square miles, as well as another school division, Fairfax County, which enrolled over 135,000 students, or over 30,000 more than would be enrolled in the proposed Richmond, Henrico and Chesterfield school division (Pet. A. 600, n. 16).

[53] This Court has approved of the use of such techniques on the part of school authorities. Swann, 402 U.S. at 24-25; North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

Also, Congress has found the use of such area-wide proportions to be of assistance in determining the effectiveness of urban school desegregation. Under the "Emergency School Aid Act", 20 U.S.C.A. §§ 1601-19 (Supp. Oct. 1972) which became effective on June 23, 1972, emphasis was directed toward the alleviation of "minority group segregation and discrimination" particularly within the context of this nation's Standard Metropolitan Statistical Areas. *E.g.*, 20 U.S.C.A. §§

trial to establish the probable degree of stability and nate effectiveness to be achieved under the proposed was accepted by the lower ourt as demonstrating that racial compositions would be within what was described ducators and sociologists as an "optimal range" (A. 242, 78, 374-75).

he district court, in referring to the ratios used by the mond School Board, noted that variations might be un-dable, and further admonished all parties that it did not nd to require a particular degree of racial balance or (Pet. A. 519). Even though (1) the ratios used were e of the City Board, (2) the Board's plan was the only before the lower court, and (3) the district judge had ifically stated his readiness to entertain proposed modifi-ns to the plan, as, for example, through the contractual ange of pupils in lieu of consolidation, the court of als viewed the relief as imposing a fixed racial quota held that it was beyond the power of the district court pose any particular degree of racial balance as a matter bstantive constitutional right (Pet. A. 570). The court peals, in discussing the proposed racial composition of schools under the metropolitan plan, found, however, the evidence seemed to indicate its workability in prac-(Pet. A. 570). Judge Winter disagreed that the basis he relief was a desire on the part of the district court hieve as much racial balance as possible. In his view, wer court was within its equitable remedial discretion r *Swann* in considering racial ratios as a part of the decreed. Judge Winter found that the range of racial s among the various subdivisions of the consolidated

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1605 (a)(2)(A), (B), 1608. It is significant that Congress de- an "integrated school" in terms of minority enrollment con- ng at least 50 per cent of the *over-all minority student population the SMSA as a whole*. 20 U.S.C.A. § 1619(6) (emphasis l).

division, as well as among the various schools within the subdivisions, was sufficient proof that the basis for the majority's opinion was without support (Pet. A. 602).

The substantial majority of students would attend a school located within the particular subdivision wherein they reside, and in no case would there be assignments between non-contiguous subdivisions. Approximately 36,000 students would be exchanged between the City system and the two Counties, with about 1,000 more whites than blacks being involved in this central city-suburban exchange (A. 232-33; Pet. A. 423). No exchange is contemplated between students residing in the more rural portion of southern Chesterfield (subdivision 6) and those in the City of Richmond (A. 205-06; Pet. A. 425-26).

Approximately 68,000 pupils were transported to school by yellow buses by the three school divisions operating independently during the 1971-72 school year (A. 233-34). Under the metropolitan desegregation plan, approximately 78,000 students would be transported from home to school, with 42,000 of these attending schools in their neighborhood zone of residence (A. 232; Pet. A. 423).

Also, during the 1971-72 school year the three school divisions operated a total of over 600 yellow buses, and of this amount only 524 would be necessary to meet the transportation requirements of the metropolitan plan (A. 236; Pet. A. 424). Travel times and distances compare favorably with those experienced presently in each of the three school divisions independently (Pet. A. 422-24). During oral argument in the court of appeals, the State and County defendants conceded, and that court later agreed, that this was not a busing case (Pet. A. 563 n. 2).

The separate treatment accorded students living within the large area composed of southern Chesterfield (subdivision 6) is indicative of the flexibility inherent in the

ichmond Board's plan. Other factors likewise demonstrate e ready adaptability of the plan: (1) the method of se-cting the students for the central city-suburban exchange uld be varied to meet the exigencies of the particular situa-on (A. 220-24, 1320-26); (2) the racial compositions of e various schools would range from 17 to 40 per cent ack; and (3) there was trial testimony to the effect that und judgment and common sense in general, in lieu of any flexible criteria, would be utilized as the particular circum-ances might warrant (A. 205, 219, 1320-26).

SUMMARY OF ARGUMENT

The propriety of the exercise by a district court of its medial powers to enjoin the creation of new school division es where the effect thereof enhances a return to "black" or white" schools or would otherwise impede the disestablish-ent of a state-mandated dual system of schools has been tablished by this Court in *Wright v. Council of City of mporia*, ___ U.S. ___, 92 S.Ct. 2196 (1972) [hereinafter cited *Emporia*] and *United States v. Scotland Neck City Board Education*, ___ U. S. ___, 92 S.Ct. 2214 (1972) [herein-ter cited as *Scotland Neck*]. Conversely, this case poses estions relating to the extent to which existing school lines n effectively thwart remedial efforts to eliminate the reality black schools surrounded by white schools within a single etropolitan community.

Both the necessity for and the remedial techniques to be ilized in the elimination of racially identifiable schools ithin school systems consisting of a black core city and hite suburban areas have also been prescribed by this Court *Swann* and *Davis v. Board of School Commissioners*, 402 .S. 33 (1971) [hereinafter cited as *Davis*]. One feature, owever, distinguishes the metropolitan areas of Charlotte id Mobile from that of Richmond. Owing to a unique

method of political subdivision alignment employed in Virginia, the center-city as a separate administrative unit for school purposes is completely enveloped by the two suburban Counties which likewise operate separate school systems. As an inevitable result of both this administrative arrangement and years of state and local discrimination, black City children attend historically all-black schools which continue to range from 70 to 90 per cent black surrounded by but in isolation from thousands of suburban students attending schools in two 90 per cent white school systems. The social and economic unity pervasive in so many other phases of life in the Richmond metropolitan community, however, belies such a separation of the area's school children.

In seeking to rectify the inequality inherent in the foregoing arrangement, both the Richmond School Board and the plaintiffs herein requested the interdivisional assignment of pupils as the essential method of desegregation envisioned in both of the alternative forms of relief sought, *i.e.*, the consolidation of the three systems substantially in accordance with provisions of State law or a contractual exchange of students between the separate divisions.

After finding that the racial identifiability of schools persisted in the Richmond metropolitan area and that "desegregation of the schools of the city and the counties as well [could not] be achieved within the current school division bounds" owing in substantial part to the deliberate deferral by the State and local authorities of plaintiffs' constitutional rights (Pet. A. 207), the district court had a duty to consider all reasonable alternatives and to select that plan which afforded the most realistic promise of working to insure the elimination of all racially identifiable schools in the Richmond metropolitan area. The district court thus approved the desegregation plan presented by the Richmond School Board calling for the consolidation of the three metropolitan

ea divisions substantially in accordance with existing pro-
ions of State law as "a first, reasonable and feasible step
ward the eradication of the effects of past unlawful dis-
imination" (Pet. A. 239).

I.

It is submitted that the district court neither exceeded its
thority nor abused its discretion in ordering the imple-
ntation of the metropolitan desegregation plan devised
the Richmond School Board. A practical application of
e explicit remedial guidelines established by this Court to
gely uncontradicted evidence compels the conclusion that
e greatest amount of actual desegregation, the elimination
racially identifiable schools and the abolition of segrega-
n and its effects can only be accomplished by the assign-
nt of students across existing school division lines. A pro-
ion of State laws negates the existence of any State policy
restrict school divisions to one political subdivision. More-
er, the traditional disregard of existing school division
es to meet educational needs and to perpetuate segrega-
n dispels any overriding State interest in restricting the as-
nment of pupils to the political subdivision in which they
ide.

Even a cursory review of the variations among the several
tes in the structuring of administrative units for the op-
ation of schools exposes the untenable nature of and the
ongruity inherent in any judicial standard which regards
sting school boundaries as sacrosanct.

It is of the utmost significance that all that is required to
ure the complete removal of the racial identifiability of
ools in the Richmond metropolitan area is the employ-
nt of measures and devices far less drastic than were
se seized upon by the State and local school authorities
perpetuating illegal segregation for years after *Brown I*.

Since methods incorporated in the Richmond School Board's desegregation plan, *e.g.*, the assignment of pupils across existing school division lines and a legislatively conceived consolidation of separate divisions, were used throughout this State in open defiance of *Brown I*, it is inconceivable that the equitable discretion of the district court can be restricted to remedial techniques less extensive than those utilized to establish and perpetuate the denial of equal educational opportunity.

This record establishes a close interrelationship between the rationale underlying the legal commands of *Brown*, *Green v. County School Board*, 391 U.S. 430 (1968) [hereinafter cited as *Green*], *Swann* and *Davis* and traditional educational goals. The crippling effects of segregation on the perceptions and motivations of school children both formed the basis for this Court's conclusion that "black" schools and "white" schools were inherently unequal and undergird one of the classic goals in education, *i.e.*, the development of attitudes and values in the preparation of children for good citizenship and effective participation in a biracial community. From a view of the realities in the Richmond metropolitan area, however, it is all too apparent that from 1954 through the trial below, resistance to integration has produced an incalculable degree of deliberate harm to many thousands of children born subsequent to *Brown I*, has drastically compounded the task of disestablishment and has precluded the eradication of the evils of segregation which cannot now be accomplished absent the interdivisional assignment of the area's students.

II.

While the foregoing circumstances are fully supportive of the district court's action, it is submitted that in a number of crucial areas, the court of appeals utilized rationale which

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is irreconcilable both with decisions of this Court and with those of other federal courts in related cases.

In requiring, as a prerequisite to the relief decreed, a demonstration of invidious purpose or racial motivation in the establishment or maintenance of the existing school boundaries, the appeals court employed a standard which has been expressly rejected by this Court in *Emporia* and *Scotland Neck*. Even if, as the court of appeals suggests, there must have been a finding that racial considerations entered into the continued maintenance of school division lines, the district court properly drew such inferences based on a variety of evidence to which the appeals court apparently assigned no importance.

More significantly, the standard espoused by the court of appeals in sanctifying the existing school boundaries in the Richmond metropolitan community exposes a complete disregard of the school desegregation guidelines previously established by this Court. The application of such a standard effectively emasculates the directives of *Brown I*, *Brown II*, *Green*, *Swann* and *Davis* and would insure the preservation of racially separate schools in the Richmond area for the foreseeable future.

Furthermore, in reaching such a result, the court of appeals departed significantly from the established standard of appellate review in school desegregation cases in making new findings based on its own interpretation of the evidence below.

Finally, it is clear that, unlike the court of appeals here, other federal courts both prior and subsequent to the decisions of this court in *Emporia* and *Scotland Neck* have used "effect-oriented" tests in determining the proper scope of a district court's remedial powers. Other fundamental variances in approach as between the decision of this and other courts of appeals in related cases are likewise demon-

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strative of the generally erroneous legal basis upon which it reversed the decree of the lower court.

ARGUMENT

I.

The District Court Neither Exceeded Its Powers Nor Abused Its Discretion In Approving A Desegregation Plan Involving The Assignment Of Pupils Across Existing School Division Lines

A.

In Light Of The Evidence Presented, The Relief Decreed Resulted From A Sound Application Of The Remedial Guidelines Previously Established By This Court

In recognition of the complexities involved in the transition from state-mandated dual school systems to ones free of the effects of racial discrimination, this Court in 1955 instructed the district courts to rely upon the breadth and flexibility inherent in their equity jurisdiction in order to mold effective relief:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. . . . To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

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II, 349 U.S. at 300 (footnotes omitted). At the same his Court also recognized that the revision of school ts and attendance areas might well be required in to provide effective relief" and in 1971 reiterated the ty for such action in appropriate cases:

> O]ne of the principal tools employed by school planners nd by courts to break up the dual school system has een a frank—and sometimes drastic—gerrymandering school districts and attendance zones. . . . More often an not, these zones are neither compact nor contigu-s; indeed they may be on the opposite ends of the city. s an interim corrective measure, this cannot be said be beyond the broad remedial powers of a court.

, 402 U.S. at 27 (footnote omitted).

Court again in *Swann* recognized the drastic nature relief that might be required: "The remedy for such ation may be administratively awkward, inconveni-nd even bizarre in some situations and may impose s on some; but all awkwardness and inconvenience be avoided in the interim period when remedial ad-nts are being made to eliminate the dual school s." *Swann*, 402 U.S. at 28.

oth *Green* and *Davis* this Court made it abundantly hat district courts were required to consider all avail-otions and alternatives in selecting a plan of desegre-which realistically offered the greatest promise of

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Court, in addressing itself to the necessity for good faith nce with the mandates of *Brown I* at the earliest practicable ted that

> . courts may consider problems related to . . . revision of hool districts and attendance areas into compact units to hieve a system of determining admission to the public schools a nonracial basis, and revision of local laws and regulations hich may be necessary in solving the . . . problems.

I, 349 U.S. at 300-01.

effectively eliminating all vestiges of a dual school system.[55]

Though disavowing any constitutional right to racial balance, this Court in both *Swann* and *Davis* reaffirmed that the district court or school authorities should make every effort to achieve "the greatest possible degree of actual desegregati " and in the former case established that in a historically segregated system a presumption arose against any schools which were substantially disproportionate in their racial composition.[56]

The cardinal guideline for school authorities and district courts alike is to be found in the repeated assertions in *Brown II, Green, Swann* and *Davis* that any proposed plan is to be judged by its effectiveness through evaluation in practice, and that new plans are required if in reality the objective in achieving actual desegregation is not attained. As was stated in *Green:*

> *[t]he obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in*

[55] Green, 391 U.S. at 439; Davis, 402 U.S. at 37. Regarding the techniques to be employed in the construction of equitable remedies generally, this Court likewise has been clear in stating that the duty of a court is to fashion a remedy which not only eradicates the effects of past evils, but also insures the prevention of the continuation or repetition of discriminatory practices in the future. Louisiana v. United States, 380 U.S. 145, 154, 156 (1965). That this doctrine is particularly applicable in school desegregation cases is evidenced by a parallel drawn in *Green* between techniques appropriate in remedying illegal school segregation and those utilized in various antitrust cases. Green, 391 U.S. at 438 n. 4. It should be noted that in the area of antitrust remedies, this Court has been careful to point out that in order to be entitled to relief, the complaining party need only show that the existing decree leaves a substantial likelihood that the practice condemned has not been satisfactorily eliminated. United States v. E. I. duPont DeNemours & Co., 366 U.S. 316, 331-32 (1961). It is thus reasonable to assume that this Court in determining the appropriate scope of relief in a desegregation case, saw the need for decrees which would not only insure the eradication of all the vestiges of the past unlawful segregation, but also to the extent feasible preclude the revival of such effects.

[56] Swann, 402 U.S. at 26; Davis, 402 U.S. at 37.

achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. *The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.* Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. . . .

. . . As Judge Sobeloff has put it,

> "'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—*the abolition of the system of segregation and its effects.* If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, non-racial system.'" . . .

Green, 391 U.S. at 439-40 (citations omitted) (emphasis added).

Since *Brown II* this Court has placed primarily reliance on the district courts to formulate effective relief, recog-

nizing that their proximity to and familiarity with local conditions places them in a better position to perform the required judicial appraisal of the relative effectiveness of proposed methods of relief.[57] Significantly, this Court has not found that any district court has exceeded the breadth and scope of its remedial powers in fashioning meaningful relief from the invidious effects of school segregation. Nor has this Court held any school system to be unitary in the face of a viable, feasible alternative holding greater promise for the attainment of the desired objective.

In this case the district court predicated the relief decreed on the foregoing remedial guidelines calling for the elimination of all vestiges of a system of dual schools by the most effective alternative or plan available under the facts and circumstances presented.[58] In the judgment of the lower court, these mandates required it to consider the totality of a myriad of factual circumstances fully established by largely uncontradicted evidence; and in this perspective, a number of these factors, the most significant of which are discussed below, led the district court to conclude that its remedial powers were not restricted by the existing school division lines.

1.

Interdependence Between Richmond, Henrico and Chesterfield and the Inevitable Effects of Such Mutual Dependency on Community and Student Perceptions

The evidence established, in the judgment of the district court, the conclusions reached by all independent consultants who had studied the three political subdivisions involved, *i.e.*, the existence of a strong economic, cultural and social

[57] *See, e.g.*, Brown II, 349 U.S. at 299; Swann, 402 U.S. at 28; Emporia, 92 S.Ct. at 2205.

[58] See note 11 *supra*.

erdependence and community of interest between the City Richmond and the Counties of Henrico and Chesterfield, lack of any distinctive geographical features dividing the ee jurisdictions, and, indeed, the artificial, confusing and nsitional nature of the boundaries which do exist (Pet. A. 2-16).

Expert testimony from southern educators[50] as well as the trict court's own intimate knowledge of local conditions it to conclude that even though students attending schools the Richmond metropolitan community would prepare citizenship and pursue their vocational, cultural and so- l goals in a community with a historically stable racial nposition of approximately two-thirds white and one-third ck, that, absent assignments across the existing school ision lines, these school children would be attending ntifiably black schools in the City and white schools in two surrounding Counties (Pet. A. 436, 469-74). The trict court accepted the detailed reasons given by these erts as to why the invidious effects of segregation on dent perceptions and motivations could not be eradicated the Richmond metropolitan community without the as- nment of pupils across the existing school division lines t. A. 477-78).

This established interdependence thus serves to accentuate reasonableness of assigning students throughout the tropolitan area since, in the words of one educational ert, they would be "living [a] lie" if otherwise confined chools with racial compositions grossly disproportionate hat of the over-all community (A. 375). Additionally, en this mutual dependency is viewed in terms of such ctices as the failure of either County to permit low cost sing or their discriminatory hiring policies regarding

[50] See pp. 84-86 *infra*.

public jobs, it becomes quite clear that the effects of such policies can and have caused an impact beyond the confines of any one of the jurisdictions in the Richmond metropolitan area.

2.

Proof Establishing Lack of Overriding Interest in Maintaining Existing School Division Lines or in Limiting the Assignment of Pupils to Schools Within the Political Subdivision Where They Reside

The district court's finding that there was no overriding State interest in the maintenance of existing school division lines as inviolate was rooted in proof of the history of previous treatment of these boundaries on the part of the State and local school authorities and the abundance of State law and policies permitting and encouraging both the creation of school divisions consisting of more than one political subdivision and interdivisional student assignments.

A plethora of evidence showed the State's complete disregard of both political subdivision and school division lines with respect to the assignment of pupils in establishing, maintaining and perpetuating segregation for many years after *Brown I* (Pet. A. 193-95, 352-56, 360-64). Existing school division and political boundaries served as no impediment to the creation and State funding of regional schools for blacks consisting of as many as five separate political subdivisions and comprising areas as large as 1,700 square miles, one of which was operated as late as 1968 (RX-86; R. Tr. G-113; Ex. A. 79; Pet. A. 352-56).

As a part of its policy of maintaining segregated schools, the State in 1960 by statute encouraged interdivisional assignments of pupils:

> The General Assembly, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this Commonwealth to

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encourage the education of all of the children of Virginia. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, *the General Assembly finds that it is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside;* and that [the localities] . . . should be authorized to levy taxes and appropriate public funds to provide for such scholarships.[60]

Thus with express State encouragement all the defendant school authorities participated in the assignment of pupils across political and school boundary lines throughout the period of tuition grants and pupil scholarships (Pet. A. 328-31), and such lines were similarly disregarded when, to perpetuate segregation, blacks were transported to other school divisions, and, indeed, across State boundaries as well to all-black schools (Pet. A. 330-31, 360-64).

The district court found that neither assignments across existing school division lines nor consolidation, though encouraged for many valid and invalid purposes in the past, had ever been utilized or considered as tools to facilitate the disestablishment of the statewide system of dual schools (Pet. A. 218-19, 278, 281-83).

As early as 1944, the State Board of Education had looked with favor on a long-range plan having as its objective approximately a 50 per cent reduction in the total number of school divisions which necessarily would have required the

[60] Va. Code Ann., § 22-115.29 (Repl. Vol. 1969) (emphasis added). Although this and accompanying laws regarding the use of tuition grants and pupil scholarships to perpetuate illegal school segregation were declared unconstitutional in *Griffin v. State Bd. of Educ.*, 296 F.Supp. 1178 (E.D. Va. 1969), the quoted statute has never been expressly repealed by the State legislature. The pupil scholarship program was not officially terminated until June 30, 1970 (Pet. A. 328).

disregard of many of the existing school division lines then coterminous with political subdivision lines as well as the grouping of then existing separate political subdivisions into single school divisions (Pet. A. 271). In fact, minutes of a 1969 meeting of the State Board reflected its viewpoint regarding consolidation of smaller school divisions as follows:

> The State Board . . . has favored in principle the consolidation of school divisions with the view to creating administrative units appropriate to modern educational needs. The Board regrets the trend to the contrary, pursuant to which some counties and newly formed cities have sought separate divisional status based on political boundary lines *which do not necessarily conform to educational needs.*

(RX-82, 20; R. Tr. F-127, 138-39; Ex. A. 63) (emphasis added).

The district court further predicated its conclusions as to the lack of any compelling interest in maintaining existing school division lines on the existence of a State statute which for many years had given unfettered discretion to the State Board of Education to divide the State into school divisions consisting of more than one political subdivision,[61] other sections of State law enacted in 1954 detailing the method of operation of school divisions consisting of more than one political subdivision,[62] and another provision which expressly

[61] Va. Code Ann., § 22-30 (Repl. Vol. 1969) (Pet. A. 607). During the pendency of the proceedings below, however, a new statute became operative which divested the State Board of the power to act alone in so dividing the States' school divisions. Va. Code Ann., § 22-30, as amended (Cum. Supp. 1972) (Pet. A. 617). See note 51 *supra.*

[62] Va. Code Ann., §§ 22-100.1, -100.12 (Repl. Vol. 1969) (Pet. A. 608-13). Slight amendments to these provisions pursuant to the July 1, 1971 constitutional revision failed to alter the substance of the 1954 statutes. See Va. Code Ann., §§ 22-100.1, -100.3 through -100.11 (Cum. Supp. 1972) (Pet. A. 618-21); see also note 51 *supra.*

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thorized the operation of joint schools by separate political bdivisions in accordance with rules and regulations promul-ted by the State Board of Education[63] (Pet. A. 355).

The lower court's conclusion that existing lines were not violate was further supported by an abundance of expert stimony that as applied to the Richmond metropolitan ea, the existing school division lines served no educational rpose, rendered effective desegregation impossible, and at the continued maintenance thereof would result in the nial of equal educational opportunity in the Richmond etropolitan area[64] (Pet. A. 231, 258, 469-78).

3.

The Further Entrenchment of the Dual School System and the Containment of Blacks Since Brown I

It was not until 1970, sixteen years after *Brown I*, that e first significant effort was made to disestablish the state-andated dual school system in Richmond, Virginia. This riod from 1954-1970 saw the further entrenchment of the al school systems in each of the three political subdivisions th the long range debilitating effects attendant thereto sulting in large measure from the overt defiance to the andates of *Brown I* and *Brown II*, the continuing discrimi-tion at the federal, state and local levels in housing and ner areas, and the concentration within the City of all blic and rent subsidized housing occupied overwhelmingly blacks.

As the district court found, the effect of the operation of all inferior all-black schools in the Counties through the e 1960's, the refusal of the Counties to authorize and per-

[63] Va. Code Ann., § 22-7 (Repl. Vol. 1969) (Pet. A. 607). The te Board minutes of May, 1946, reflect a detailed set of regula-ns developed for the operation of joint schools by counties and es (RX-82, 4-7; Ex. A. 57).

[64] See pp. 84-86 *infra*.

mit low cost housing within their boundaries, and their blatant discrimination in public employment, had the foreseeable consequence of deterring the movement of blacks to the Counties (Pet. A. 195-211, 380-82, 392). School site selection and construction through the 1970-71 school year corresponded to and was superimposed upon the segregated residential housing patterns within the three localities as a result of the school authorities' continued adherence to neighborhood zoning irrespective of its effects on the process of desegregation[65] (Pet. A. 203-11).

4.

Accentuation of the Gross Racial Disparities Since 1954 Attributable In Part to State and Local Discrimination Through 1971

During the sixteen-year period from 1954 to 1970, characterized by the continuous utilization of practices designed to frustrate the process of school desegregation, the student racial composition of the City system changed from 56 per cent white to 66 per cent black, notwithstanding the 1970 annexation which produced an influx of more than 8,000 students, 97 per cent of whom were white. Over the same period of time, the student racial compositions of the rapidly growing contiguous suburban communities of Chesterfield and Henrico had changed from 20 and 10 per cent black respectively to 9 and 8 per cent black. The number of black students in the City had increased from 15,000 to 30,000 with the result that 85 per cent of the blacks in the Richmond metropolitan area attended schools in the City. The combined racial composition within the three school divisions, however, had varied less than one-tenth of one per cent in the decade from 1960 to 1970.

The district court found that discriminatory practices and policies in education, housing and employment had facili-

[65] See pp. 44-47 and note 48 *supra*.

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ated the further entrenchment of the dual school systems, ad contributed in part to the acceleration of the racial isparities between the City and County systems, and had endered the process of disestablishment more difficult[66] Pet. A. 212-22, 237, 478-514).

5.

Failure of the Three School Divisions Involved to Establish Unitary Systems by June, 1971

The open hostility of the County school authorities to any ntegration and the continued operation by all three school ystems of black and white schools clearly identifiable as such y reference to student population and/or faculty member- hip through the school year 1970-71 has been summarized reviously at pp. 37-43 *supra*. Thus, at the time of the hear- gs below all three systems were in the process of imple- enting either court-ordered or HEW-induced plans of de- egregation—required as a result of their persistent denial f equal educational opportunity and, like other recent cases resented to this Court,[67] a condition justifying the continued xercise of the district court's remedial power.

6.

White Attrition in City Schools and the Foreseeable Effects Thereof

The first significant attempt to desegregate Richmond hools occurred in the 1970-71 school year with the imple- ntation of the "Interim Plan" which was accompanied an exodus of more than 3,000 or 15 per cent of the City's tal white student population. This loss represented a 300

[66] This conclusion on the part of the district judge is quoted more ly at p. 35 *supra*.

[67] *E.g.*, Emporia, 92 S.Ct. 2196; Scotland Neck, 92 S.Ct. 2214; ann, 402 U.S. 1.

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per cent increase in white attrition over previous years. Twelve months later the desegregation plan modeled upon the principles enunciated in *Swann* produced another exodus of more than 3,000 white students. Thus, Richmond sustained a loss of more than a third of its white students within a 12-month period involving two school openings.

The district judge concluded that this massive withdrawal from the City system foreshadowed an all-black system within the foreseeable future and that the process of increasing polarization was immeasurably facilitated by the existence of the two virtually all-white school systems surrounding the City (Pet. A. 207-10). Judge Merhige thus concluded that effective relief could not be afforded within the limits of the City of Richmond and that the assignment of pupils across the existing school division lines was essential to the complete disestablishment of the state-mandated and perpetuated dual school system (Pet. A. 201). These conclusions were amply supported by expert testimony predicting the utter frustration of the promises of *Brown I* and the certainty that black students for the foreseeable future could only look forward to attending substantially all-black City schools ringed by virtually all-white suburban schools[68] (Pet. A. 469-78).

7.

The Presentation of a Desegregation Plan Promising Realistically to Eliminate All Vestiges of the Dual School System

Both the Richmond School Board's motion to compel joinder of parties needed for just adjudication and the plaintiffs' amended complaint envisioned a metropolitan desegregation plan wherein assignments of pupils would not be restricted by the existing school division lines. The plaintiffs sought relief by either the merger of the Richmond, Henrico

[68] See pp. 84-86 *infra*.

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Chesterfield school divisions or through the develop-
of a court-approved plan for the exchange of pupils
een the three separate divisions.

e State and County defendants failed to offer any
sed modifications or alterations to the plan submitted
e City School Board nor did they submit any other
despite adequate time and invitations to do so from
istrict court and the Richmond Board as well. The
ct court's order of January 10, 1972, which gave rise
s petition provides the State defendants with an abiding
rtunity to seek modifications and alterations to the ap-
d plan (Pet. A. 541).

nificant features of the metropolitan desegregation plan
been detailed previously at pp. 47-53 *supra*. The lower
found the plan to be educationally sound and its imple-
ation reasonable, feasible and workable (Pet. A. 428,
. The district judge, based on evidence presented, con-
d that the metropolitan plan offered vastly superior
ects for effective relief in that it would insure: (1) the
cation of all vestiges of the dual system of schools
gh the removal of the racial identifiability of all fa-
s in the Richmond metropolitan area; (2) the aboli-
of the County systems as white havens facilitating the
er resegregation of Richmond schools; and (3) the
nation of the extreme racial disparities between the
and County systems (Pet. A. 239-40, 418-35).

rther buttressing these findings was the testimony of
ern educators who, based on their substantial experi-
in desegregation efforts, were convinced that the plan
d provide long-range stability (A. 243, 381, 432). In
of the static racial composition of students attending
mond, Henrico and Chesterfield schools (from 1960 to
, the combined systems had been approximately 65 per
wh. e and 35 per cent black), these witnesses reaffirmed

the educational advantages in achieving a racial composition within each school which would not be substantially disproportionate to the racial composition of the entire school community (A. 242-43, 373-77, 432-34). They endorsed the preliminary estimates of variances in each school ranging from 17 to 40 per cent black as accomplishing this objective. Testimony from an eminent sociologist who specialized in race relations indicated that the suggested range approximated the optimal racial compositions which have produced the most effective integration.[69]

SUMMARY

Under the remedial guidelines established by this Court, the district court clearly had the following duties: (1) to consider all available options and alternatives designed to

[69] In testifying as to the general characteristics of meaningful integration in public education, this witness further explained the interrelationship between over-all percentages of black student enrollment and participation in the various activities of any particular school (A. 273-74). His conclusions as to effective integration were supported by a Chesterfield exhibit which, although introduced for a different purpose graphically illustrated the educational advantages of meaningful integration as opposed to racial sprinkling or isolation. The general extra-curricular activities for six Chesterfield high schools were listed showing participation therein by race. The racial composition of the schools ranged from 3 per cent to 44 per cent black. Increasing levels of black student enrollment revealed a corresponding rise in the number of integrated activities as follows:

School	*Black Enrollment*	*Number of Integrated Extra-Curricular Activities*
Meadowbrook	3%	11 of 38
Manchester	5%	14 of 24
Midlothian	7%	28 of 28
Thomas Dale	11%	30 of 37
Grange Hall	34%	10 of 13
Matoaca	44%	13 of 13

(CX-32; A. 1025; Ex. A. 131).

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eliminate all vestiges of the area's dual school system which, of course, included the plan submitted by the Richmond School Board; (2) to weigh the relative effectiveness of desegregation efforts then under way in the City and Counties as against the greater promises inherent in the Richmond School Board's plan; and (3) to select the alternative providing for the greatest amount of actual desegregation and offering the most realistic chance of working in actual operation. Considering these duties in light of the diverse factual circumstances noted above which attested to the soundness of the proposed metropolitan desegregation plan, it is abundantly clear that the district court was compelled to order the relief ultimately decreed.

B.

THE EFFECTIVENESS OF RELIEF IN DE JURE METROPOLITAN AREAS SHOULD NOT BE MADE DEPENDENT UPON THE MANNER IN WHICH A STATE HAS ELECTED TO ALIGN ITS LOCAL SCHOOL DIVISIONS

As noted previously, considerable variances exist among the several states with respect to school division alignments. In Virginia, North Carolina and Alabama, states with a history of state-mandated systems of segregated public schools, there is no uniformity in the interrelationship between school division and political subdivision lines.[70] In

[70] In other de jure states, school district lines do not necessarily coincide with political subdivision boundaries. *See, e.g.*, United States v. Texas, 321 F.Supp. 1043 (E.D. Tex. 1970), *aff'd*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, ... U.S. ....., 92 S.Ct. 675 (1972); Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969). Nor do school boundaries conform to political subdivision lines in other areas currently involved in school desegregation litigation. *See, e.g.*, Bradley v. Milliken, Nos. 72-1809, -1814 (6th Cir., Dec. 8, 1972), *vacated for rehearing en banc*, (Jan. 16, 1973); United States v. Board of School Comm'rs. of City of Indianapolis, 332 F.Supp. 655 (S.D. Ind. 1971), *aff'd*, No. 72-1031 (7th Cir., decided Feb. 1, 1973).

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Charlotte, North Carolina, and Mobile, Alabama, each respective school district includes the urban core city along with the surrounding suburban county. The cities themselves are but a part of a larger political subdivision which encompasses the entire metropolitan area involved. On the other hand, Virginia is unique in that Richmond and, indeed, all of its cities are separate political subdivisions which under State law have the right to operate separate school systems.[71]

In all three cities mentioned, the overwhelming percentage of black citizens live within the city limits ringed by substantially all-white suburban areas.

In upholding the district court in *Swann*, this Court approved a desegregation plan projecting a racial composition under which substantially all schools in the Charlotte-Mecklenburg metropolitan area would range from 9 to 38 per cent black. *Swann*, 402 U.S. at 9-11. In *Davis*, this Court rejected attempts by Mobile school authorities to rely upon a natural geographical barrier as a means of effectively confining the majority of black students in that metropolitan area to substantially all-black schools in the core city. In both Charlotte and Mobile, the racial compositions of individual schools now bear a reasonable relationship to the over-all racial composition of the entire metropolitan school population.

In the Richmond metropolitan community, however, 85 per cent of all the black students are presently confined to

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[71] This States' internal arrangement of its political subdivisions is unusual for instance, in that a single county may completely surround a separate city, *see, e.g.*, *Emporia*, 92 S.Ct. 2196, or a single metropolitan area may be subdivided into multiple political jurisdictions as is the case here where the City of Richmond is completely surrounded by the two separate counties of Henrico and Chesterfield.

Furthermore, as this Court has noted, the independent political subdivisions in Virginia have a right under state law to operate their own school systems. Emporia, 92 S.Ct. at 2199 n. 5, *citing* Va. Code Ann., § 22-93 (Repl. Vol. 1969) (case citation omitted).

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schools within the City system ringed as it is by the two County systems each of which is more than 90 per cent white.

The district court found that, viewed in its metropolitan setting, the Richmond school system was clearly identifiable as black and those of Henrico and Chesterfield as white (Pet. A. 201), and that additional white attrition from the Richmond system facilitated by the close proximity of the substantially all-white County systems could reasonably be anticipated (Pet. A. 209-10).

Though conceding that the evidence indicated the workability of the racial compositions envisioned in the City School Board's metropolitan desegregation plan (Pet. A. 570), the court of appeals nevertheless held that in its concern for effective relief, the district court had exceeded its powers in ordering the implementation of the plan in the absence of a specific finding of invidious racial motive or intent in the establishment or maintenance of the existing school division lines (Pet. A. 580-81). Absent such findings, the court of appeals held in effect that the tenth amendment permitted Virginia to adhere to its particular scheme of school division alignment even though a more effective plan for the elimination of all the vestiges of the dual system of schools in the Richmond metropolitan area was thereby precluded.

In having thus sanctioned the maintenance of virtually all-black and all-white school systems in the Richmond metropolitan community with its history of de jure segregation in public education, the court of appeals has implicitly approved less effective relief based solely on the manner in which this State has chosen to align its school divisions. Because, in that court's view, school boundary lines must conform to the three political subdivisions in the Richmond metropolitan area, patterns of school segregation, racially identifiable schools and inherent educational inequalities

eliminated in the Charlotte and Mobile metropolitan areas are allowed to persist in this community.

Thus, the marked polarization of black and white children attending schools in the Richmond metropolitan area serves as the antithesis of the effective integration which, owing to the implementation of school desegregation plans approved by this Court, enjoys current vitality in similar metropolitan areas. This bizarre result stems from a sanctity accorded existing state-created lines not permitted in cases where other fourteenth and fifteenth amendment rights have been involved.[12]

The constitutional basis commending the rationale employed by the court of appeals thus must be questioned. Clearly the application of the tenth amendment fails to justify such a result; instead, in severely limiting the district court's remedial powers, it serves only as a resurrection of echos from the past when it was unsuccessfully invoked by the State of Virginia as a basis for interposition as well as a host of other laws and policies used in flouting *Brown I*.

Though the state is the relevant unit of equality under the fourteenth amendment, the degree of effectiveness of relief within a particular geographical area of a state should rest upon the feasibility of viable alternatives available and not upon the happenstance of variances in school division alignment.

Contrary to the view of the court of appeals, it was not asked to compel one of the states to restructure its internal government for the purpose of achieving racial balance (Pet.

[12] This Court has steadfastly refused to allow political subdivision or any other state-created lines to control the effective exercise of fundamental constitutional rights unrelated to school desegregation. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (legislative district lines); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional district lines); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (political subdivision lines).

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A. 562). No party has asserted any constitutional right to racial balance; rather it is the right, to the extent feasible, to effective relief from the invidious and persistent denial of equal educational opportunity which prompted the relief decreed in the district court. Certainly it is neither unfair nor unreasonable to require those who perpetuated the wrong to implement a plan of feasible relief which the lower court found to offer the only realistic promise for success in effectively eliminating the racial identifiability of all Richmond area schools through the removal of all vestiges of the dual school system. The extensive variances in school division alignment throughout the several states not only establish that no one form is crucial, but also demonstrate the incongruity inherent in regarding such lines as a limitation on the equitable remedial discretion of the district courts.

Since the statewide system of dual schools was the evil struck down in *Brown I*, it would indeed be ironical if one of the guilty and recalcitrant states could in fact effectively segregate thousands of its black school children owing to a fortuitous alignment of school divisions regardless of the existence of feasible and viable alternatives.

C.

JUSTICE REQUIRES THAT THE MEANS OF DISESTABLISHMENT SHOULD BE AT LEAST COEXTENSIVE WITH THOSE USED TO ESTABLISH AND PERPETUATE THE STATEWIDE SYSTEM OF DUAL SCHOOLS

A major portion of the proceedings below consisted of the extensive development by largely uncontradicted evidence of the practices and methods utilized by the State and local school authorities in both the establishment and the post-*Brown I* perpetuation of a dual system of schools, and of their reluctant and incomplete efforts in eradicating the vestiges thereof up to the time of the hearings below. All of the devices and means, both ingenious and ingenuous,

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employed in vain, yet harmful attempts to defy, circumvent and delay the realization of the promises of *Brown I* and *Brown II* were detailed in full. Accordingly, this evidence and its own considerable experience in school desegregation cases in Virginia compelled the district court to reject the pleas of the State and County defendants concerning this State's allegedly historical tradition of local autonomy in school operations, and their opposition to assignments across existing school boundaries and to the consolidation of the three school divisions.[73]

During this all too recent period, the State, for the purpose of perpetuating segregation, not only without objection but with the encouragement of the Counties, assumed all control over the assignment of pupils and, in some instances, the complete operation of local public schools—which attributes are now alleged to be the hallmarks of the so-called historical tradition of local autonomy in the operation of Virginia's public schools ((Pet. A. 575-76). For decades the State encouraged consolidation of separate school divisions and the operation of joint schools for all educational objectives, save desegregation. Years ago the Virginia legislature established a detailed framework for the operation of school divisions consisting of more than one political subdivision,[74] though obviously with no view of utilizing this procedure as a tool in the dismantling of dual school systems.

The State with the concurrence of local school authorities employed principles of consolidation in establishing regional schools for blacks which operated as late as 1968, and many local school boards including the defendants herein for many

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[73] The district court also made specific findings regarding the racial hostility which underlay the opposition to the use of such obvious techniques on the part of the State and County officials (Pet. A. 212, 230-31). See pp. 97-100 *infra*.

[74] See note 51 *supra*.

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years engaged in the joint operation of special educational facilities which of necessity required the daily crossing of the existing school division lines; however, neither the State nor local school authorities have ever recommended that these techniques be employed for the purpose of disestablishing the system of dual schools. Rather, the assignment of students across existing school division, political subdivision, and, indeed, State lines was encouraged, financed and required of thousands of pupils by the State and local authorities for the sole purpose of perpetuating segregation.[75]

The desegregation plan presented by the Richmond School Board and approved by the district court involved the assignment of pupils across existing school division lines and the utilization of the legislatively conceived plan for the operation of a consolidated school division—the same tools and principles utilized by the same school authorities in establishing a system of segregated schools and in maintaining and perpetuating it for years after *Brown I*.

It is apparent that the district court deemed such long-standing utilization of these devices and principles for both valid and invalid purposes as affording a rational basis for requiring the defendant State and local authorities to exer-

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[75] The district court specifically cataloged a group of "[e]arlier judicial opinions [which bore] witness to Virginia's policy permitting the transportation of pupils across political subdivision lines for the purposes of maintaining segregation" (Pet. A. 194) *citing* Buckner v. County School Bd., 332 F.2d 452 (4th Cir. 1964); School Bd. of Warren County v. Kilby, 259 F.2d 497 (4th Cir. 1958) (where Warren County's maintenance of only one high school which was restricted to whites caused it to transport some of its Negro children of high school age 50 miles daily to a facility in adjoining Clarke County and others over 50 miles one way to a distant high school for Negroes in Prince William County where they were required to stay for five days of the week, being boarded at public expense); Corbin v. County School Bd., 177 F.2d 924 (4th Cir. 1949); Goins v. County School Bd., 186 F.Supp. 753 (W.D. Va. 1960) (involving daily transportation of Negro high school students from residences in Grayson County to location in Wythe County for one-way distances ranging from 30 to 40 miles).

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cise the powers which they now have under State law in providing for the complete and effective desegregation of all schools in the Richmond metropolitan community:

> [I]nstances . . . of the education of pupils of one political subdivision in schools run in whole or in part by officials of another demonstrate as a matter of historical fact the insubstantiality of any argument that strong state concerns support their maintenance as barriers to the achievement of integration. *For the State has countenanced much more than the plaintiffs seek here.* Standard practice has encompassed schemes under which students are educated in systems financed and operated by local officials wholly irresponsible, in the political sense, to residents of the students' home area. Centrally-enforced uniformity in certain educational practices has no doubt helped to make this acceptable. But here the plaintiffs do not demand that desegregation take place by means that render school authorities politically irresponsible to the parents of the children they teach. Means are available, such as the consolidation form presented in Virginia law, by which representatives of each political subdivision will have a role in management of a combined school system. Flexible state law provisions for financing exist as well. *The State cannot insist that compliance with its own statutory policy violates some substantial interest.* This is so especially in the light of the recurrent successful use of the joint system of school management, which entails the operation of facilities by a committee of control, having representatives from participating school divisions, with financing provided by the political bodies of each.

(Pet. A. 194-95) (emphasis added).

In view of its silence in this area, however, it can only be inferred that in the judgment of the court of appeals such past conduct was irrelevant in determining the scope of the remedial powers of the lower court.

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This court as early as 1955 in *Brown II*, 349 U.S. at 299-301, recognized the extreme complexity of the problems involved in the dismantling of state-mandated dual school systems, and that imaginative and, indeed at times, drastic measures might well be required. The record herein fully establishes, however, that the State of Virginia has taken no affirmative voluntary actions, much less drastic or imaginative ones, to dismantle its dual system of schools (Pet. A. 212-22, 332-52). In light of this State's abdication of its affirmative duty to take whatever steps might be necessary to eradicate all vestiges of its dual system of schools,[76] simple justice compels the approval of the district court's action in molding its decree to meet the exigencies of the case through a utilization of means and methods at least coextensive with

[76] As of January 15, 1971, the State defendants were still expressly denying the existence of any such affirmative duty (A. 113-16) and their position throughout the trial was that the basic responsibility lay with the local school authorities (A. 678-93). Certainly, at this late date, however, the existence of such a duty on the part of state school authorities is abundantly clear. *E.g.*, Smith v. North Carolina State Bd. of Educ., 444 F.2d 6 (4th Cir. 1971); United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), *supplemental order* of April 19, 1971 (unreported), *modified and aff'd*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); Godwin v. Johnston County Bd. of Educ., 301 F.Supp. 1339 (E.D. N.C. 1969); Franklin v. Quitman County Bd. of Educ., 288 F.Supp. 509 (N.D. Miss 1968); Lee v. Macon County Bd. of Educ., 267 F.Supp. 458 (M.D. Ala.) (three judge court), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967); *see* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 846-47 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967).

The court of appeals, although not even alluding to the State's affirmative duty in this case, has belatedly recognized in another context that the local school board in Virginia is but "an arm of the State. . . ." National Socialist White People's Party v. Ringers, No. 72-1737 (4th Cir., decided Feb. 5, 1973) (slip opinion at 3). This Court years ago established that local public school authorities "from the point of view of the Fourteenth Amendment . . . [stood] . . . as the agents of the State." Cooper v. Aaron, 358 U.S. 1, 16 (1958).

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those which have been employed by the State and local officials in the active and continuous perpetuation of illegal discrimination in public education.

The limitations on the remedial power of the district court as imposed by the court of appeals in this case, however, are productive of the following incongruity: the powers of the lower court to insure the removal of all vestiges of a state-enforced dual school system are to be less extensive than were the means utilized by the State and local school authorities alike in perpetuating the denial of equal educational opportunity; and the existence of school division lines which have never served as barriers or impediments to the retention and promotion of segregation in the past, now precludes effective relief in the Richmond community.[77]

The Richmond School Board submits that proof of state support and encouragement of student assignments across political subdivision lines for valid educational purposes as well as for the perpetuation of illegal segregation, the prior use of principles of consolidation both to effectively segregate blacks and for worthy educational purposes as well, and the existence of a legislatively conceived plan for the operation of a school division composed of two or more political subdivisions collectively afford a sound basis for the judicial approval of such techniques as a means of eliminating all vestiges of a system of state-mandated segregation in the Richmond metropolitan area.

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[77] The United States Court of Appeals for the Fifth Circuit has recognized that "[b]arriers which did not prevent enforced segregation in the past" will not be allowed to impede the process of desegregation. Henry v. Clarksdale Mun. Sep. School Dist., 433 F.2d 387, 394 (5th Cir. 1970).

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D.

THE CONTINUING DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY WITHIN THE RICHMOND METROPOLITAN AREA IS ATTESTED BY AN APPLICATION OF THE RATIONALE UNDERLYING BROWN I AND A TRADITIONAL GOAL OF EDUCATION

The inequality inherent in a system of separate education and the deleterious effects on the perceptions and motivations of school children were the predicates underlying the constitutional violation proscribed by *Brown I*. The need for the correction of the harm recognized in *Brown I* also formed the basis for the creation of the affirmative obligation on the part of state and local school authorities to eliminate to the extent feasible the racial identifiability of schools through the eradication of all vestiges of the state-mandated dual school systems.

Since *Brown I*, courts and those educators charged with the responsibility of providing equal educational opportunity to all children have tended to consider the legal obligations imposed as something apart from traditional educational goals. All have been slow to grasp the interrelationship between the affirmative duty to promote the greatest amount of actual desegregation and the fundamental purposes of education. That the legal requirements, however, do in fact parallel the primary objectives of education is amply supported by this record and the findings of the district court. Of equal significance, a view of the operation of schools in the Richmond metropolitan area since *Brown I* in light of these intertwined disciplines provides a vivid example of the incalculable harm which persists today as a result of the deliberate and continuing deferral of quality education and equal educational opportunity to the children in the Richmond school community. Moreover, the application of these educational principles to the situation existing in Richmond

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today is strongly indicative of the means required to bring fulfillment to the promises of *Brown I* and *Brown II*.

The bases for the conclusions that "in the field of public education the doctrine of 'separate but equal' ha[d] no place" and that "[s]eparate educational facilities [were] inherently unequal" *Brown I*, 347 U.S. at 495, were the same intangible yet vital considerations underlying earlier decisions condemning segregation in higher education:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Brown I, 347 U.S. at 494. This Court then quoted with approval from the opinion of the Kansas case then before it:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Brown I, 347 U.S. at 494 (footnote omitted).

Prominent southern educators experienced in the area of school desegregation established during the trial below the nature in which such effects on perceptions and motivations underlay one of the two basic objectives of public education, *i.e.*, the development of attitudes and values essential to good

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izenship and effective participation in society (A. 369-75, 8-29).

These witnesses expanded upon the previous delineation this Court of the invidious effects of separateness in edu-ion, the benefits to be derived from effective integration d, from purely an educational standpoint, the necessity of minating the racial identifiability of schools to the extent sible as a prerequisite for the preparation of children for in a multi-racial society (A. 372-75, 428-29). All agreed t from an educational standpoint the development of itudes and values as a purpose of public education was ually important as and inextricably interwoven with the er acknowledged purpose of education, namely, the teach- of academic skills (A. 371, 428-29). They were in com-te agreement that in a biracial community such as the chmond metropolitan area meaningful integration to the ent feasible was an essential element of quality education d equal educational opportunity and that meaningful in-ration was as vitally important for white students as for ~~in a multi-racial society (A. , ,). All agreed of academic skills (A. , ,). They were in com-~~cks. (A. 243, 432). They also delineated reasons why dents, parents and teachers of both races in the Richmond tropolitan area have historically perceived "black" schools "bad" or "inferior" and "white" schools as "good" or perior" (A. 369-76). These same witnesses explained y the invidious effects of segregation could not be eradi-ed in the Richmond metropolitan area absent the assign-nt of pupils across the existing school division lines. 243, 375-76, 429-30, 434).

The foregoing expert testimony coupled with the findings he district court thus belies the existence of any dichotomy ween legal requirements and fundamental educational ncepts. Though not establishing any new constitutional hts, such testimony and findings from an educational ndpoint support the necessity for and the potential ef-

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fectiveness of the relief decreed if public schools in the Richmond metropolitan area are to prepare children for good citizenship and effective participation in this, a biracial community.[78]

The debilitating effects on the hearts and minds of black children throughout the State of Virginia which flowed from the pre-1954 conduct on the part of State and local school authorities has been well documented in the *Brown* decisions. A summary of this record as it bears on the conduct of these same school authorities since 1954 affords a sound measure of both the continuing nature of the constitutional violation, and the incalculable additional harm inflicted on these school children by virtue of the all-pervasive and deliberate maintenance of separate educational facilities and the concomitant deferral of equal educational opportunity.

The manner in which the post-*Brown* harm compounded the problem of disestablishment is easily perceived. Countless thousands of children have commenced and completed their

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[78] A witness testifying as an educational expert on behalf of the State and County defendants acknowledged his participation in and endorsement of a previous study wherein it was concluded that a merger of the two school systems in the Raleigh-Wake County, North Carolina metropolitan area would be beneficial in that "the schools [were] the basic preparation agent for the community" and that "a single school system would have greater capability for responding to the challenges of the urbanizing community" (RX-93, 3; A. 1114-16; Ex. A. 149). This witness further acknowledged making observations in that study to the effect that

> school children of one district deserve the same educational opportunities as children of the other district. Educational opportunities for children and youth should not be dependent on where they happen to reside within Wake County. Wake County and Raleigh compromise [*sic*] a unified socioeconomic cultural area. Many children and youth educated in the Wake County schools will eventually live and work in Raleigh. The concern of Raleigh citizens for the education of these county children and vice versa should be a very practical one.

(A. 1119).

formal education in the public schools of the Richmond metropolitan area since 1954. Indeed, a second generation of school children had completed a substantial portion of their formal education by the close of the 1970 school year during which the plaintiffs' motion for further relief was filed—and substantially all had done so in either black or white schools. In fact, in 1970, there were many more thousands of black pupils attending all-black schools in the Richmond metropolitan area than was the case in 1954 (Pet. A. 417-18, 524-32).

Many of these children and their parents witnessed and suffered the consequences of the primary force which this record graphically depicts—the utilization of all State means and resources in open defiance of *Brown I* through the maintenance of policies dedicated to the perpetuation of complete segregation for as long a time as possible, and thereafter to the minimization of integration in every conceivable manner.

Beginning with the official action of the State Board of Education in calling for adherence to State law through continued maintenance of segregated schools subsequent to the rendition of the *Brown* decisions, the dismal courses of interposition, massive resistance, recalcitrance and delay were pursued. The highlights include: the repeal of the compulsory attendance laws for the purpose of avoiding any integration; the establishment of tuition grants and pupil scholarships to enable those confronted with any prospect of integration to enter either all-white private schools or to cross political subdivision lines to attend all-white public schools; and the enactment of the Pupil Placement Act, the repeal of which did not occur until 1966. Contrary to the present argument advanced by the State and Counties regarding the historic local autonomy of schools in Virginia, the Pupil Placement Act divested the local school boards of

all authority regarding the assignment of pupils in an attempt to maintain separate schools for blacks and whites. Even though the State's view as to central-versus-local control over schools has thus varied since 1954,[79] one definitive conclusion can be readily drawn from this vacillation: alternating preferences for local as opposed to centralized control have been dictated by the degree to which one or the other best served the perpetuation of segregated public schools.

This State continued to participate in the operation of regional schools for black students serving multiple political subdivisions as late as 1968. The attendance areas for the all-black regional schools encompassed as many as five counties and 1,700 square miles. Indeed, the travel distances to one such facility were so great that black student dormitories were necessitated.

When, in 1965 this State entered into a compliance agreement under the Civil Rights Act of 1964 in order to avoid the cutoff of federal funds, it took the position that desegregation was a primary concern of the local school boards and refused to assert any positive leadership in dismantling the statewide system of dual schools.

The State's most recent contribution in rendering the disestablishment of its dual school systems more difficult concerns the amendment by the legislature during the pendency of this suit of Section 22-30 of the Code of Virginia which had previously granted unfettered power to the State Board

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[79] *Compare* the 1954 statement of the Attorney General of this State at note 35 *supra* to the effect that Virginia's schools had been operated pursuant to a *centrally controlled* plan regarding the maintenance of segregated public schools and the frequent use of other State-level practices such as the closing of integrated schools (Pet. A. 533-36) *with* the trial testimony of one of the State school authorities concerning his view that in the late 1960's when the individual school divisions were forced to desegregate in order to avoid the termination of federal funds, the primary responsibility for such disestablishment lay with the local school authorities (A. 678-93).

of Education to place more than one school division under the operation of a single superintendent. If, prior to the amendment, the State Board had directed such a reorganization of the Richmond, Henrico and Chesterfield school divisions, it is inconceivable, the continuation of separate school boards in each system notwithstanding, that present patterns of segregation in Richmond area schools would have withstood constitutional challenge under *Swann*. The amendment, however, removed the previous power of the State Board to subdivide the State into appropriate school divisions by requiring that any placement of more than one political subdivision into a single division henceforth could be accomplished only with the consent of the school boards and the governing bodies of each of the political subdivisions to be affected.[80]

Finally, perhaps the greatest factor compounding the post-*Brown* evils and rendering disestablishment even more difficult was the continued use through the school year 1970-71 by the State and local school authorities of pre-1954 policies dealing with school site selection and construction to the end that schools built for one race or another served attendance zones that were superimposed over segregated housing patterns. Construction programs carried out through 1970 and 1971 in Richmond, Henrico and Chesterfield had as their purpose and effect the perpetuation of segregation by race. No school site has ever been selected by any of the jurisdictions for the purpose of assisting in the process of desegrega-

[80] The statutory change was prompted by a general revision of the State's constitution which, however, did *not* require the legislature to restrict the State Board's power to divide the State into school divisions to the degree accomplished under § 22-30, as amended. See § 5(a) of Article VIII of the Constitution of Virginia, as revised (1971) (Pet. A. 15); see also note 51 *supra*.

tion—a fact one county school official readily admitted (A. 494). Thus, the evidence in the lower court (Pet. A. 283-313) fully attests to the soundness of this Court's determination in *Swann* that school site selection is a potent weapon for the continued maintenance of segregation.[81] The first step toward substantial desegregation did not occur in the City of Richmond until the 1970-71 school year, and Henrico and Chesterfield, both of which had operated countywide schools for blacks as late as 1968-69 and 1969-70, respectively, were still operating racially identifiable black schools during the 1970-71 school year even though the total black enrollment was 8.1 per cent in Henrico and 9.4 per cent in Chesterfield.

The reasoning of this Court in *Swann* makes it clear that even in a static community the continuation of a policy of superimposing neighborhood schools on segregated residential housing patterns effectively segregates school children. Certainly the continuation of such a process in the Richmond area from 1954 to 1970 had the same effect and severely complicated the task of eliminating the racial identifiability of area schools which was first undertaken in late 1970. Additionally, the growth and demographic changes occurring in the Richmond area during this period undoubtedly served to magnify the injurious effects of the above processes.

Even though the black-white student ratio in the Richmond metropolitan area remained constant, *i.e.*, 65 per cent white and 35 per cent black, the gross racial disparity between the City of Richmond and the two Counties was further accentuated. At the time of *Brown I*, the student population of Richmond was 43.5 per cent black, and Henrico and Chesterfield were 10.4 per cent black and 20.4 per cent

[81] See note 40 *supra*.

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black, respectively. The total enrollment in Richmond grew from approximately 36,000 in 1954 to approximately 43,000 in 1970, but its racial composition was approximately 70 per cent black by June, 1970. Duirng the same period, the number of black students in the Richmond system more than doubled—from approximately 15,000 to approximately 30,000. The significant growth in the student population in the Counties during this period of approximately 37,000 additional white students reduced the percentage of black enrollment in Chesterfield schools from more than 20 per cent black to less than 10 per cent, while Henrico's percentage of black enrollment dropped from 10.4 per cent to approximately 8 per cent. Ironically, in the 1969-70 school year the number of blacks in all-black schools in the Richmond metropolitan area was substantially greater than was the case in 1954.

The involvement of the State Board of Education and the School Boards of the City of Richmond and the Counties of Henrico and Chesterfield in all of the State policies of resistance to integration subsequent to *Brown I* establishes the continuing nature of the constitutional violation requiring relief. Indeed, the constitutional violation giving rise to the relief decreed in *Swann* is not fairly distinguishable from the necessitating relief in the Richmond community. Clearly, the district court was fully justified in its belief that the breadth and flexibility inherent in its equity jurisdiction was more than adequate to prevent the architects and adherents of years of pervasive discrimination from advantaging themselves of their own illegal practices through the effective segregation of thousands of white and black students in the Richmond metropolitan area.[82]

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[82] In this context, the district court concluded as follows:

> In the light of all the evidence the insistence now by school authorities upon a system of separate attendance districts within

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II.

The Decision Of The Court Of Appeals Is Irreconcilable With Applicable Decisions Of This Court And Rationale Utilized By Other Federal Courts In Related Cases

The incompatibility of the opinion of the court of appeals with decisions of this Court manifests itself in three significant areas: the standard for assessing the sanctity of existing school division lines and the existence of a constitutional violation; the drastic limitations placed upon the previous guidelines established by this Court for the shaping of effective relief; and the significant departure from the accepted standard of review in school desegregation cases.

The reasoning employed by the court of appeals is likewise at odds with that of other federal courts which have considered similar issues.

A.

The Test Of The Court Of Appeals For Assessing The Sanctity Of Existing School Division Lines And The Existence Of A Constitutional Violation Is Predicated On A Judicial Standard Expressly Rejected By This Court

It is clear that in evaluating the sanctity of the existing school division lines in this case, the court of appeals as it had done in *Wright v. Council of City of Emporia*, 442 F.2d 570, 572-74 (4th Cir. 1971) and *United States v. Scotland Neck City Board of Education*, 442 F.2d 575, 577, 582 (4th Cir. 1971), focused on the purpose and motivation underlying the establishment and maintenance of such lines in the Richmond metropolitan area:

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the enlarged community reflects the desires of the State's central and local officials, based at least in part on their perceptions of their constituents' wishes, to maintain as great a degree of segregation as possible.

(Pet. A. 201).

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> It is not contended by any of the parties or by amici that the establishment of the school district lines more than 100 years ago was *invidiously motivated*. We have searched the . . . opinion of the district court in vain for the slightest scintilla of evidence that the boundary lines of the three local governmental units have been maintained either long ago or recently for the *purpose* of perpetuating racial discrimination in the public schools. . . .
>
> . . . .
>
> [N]either the record nor the opinion . . . even suggests that there was ever joint interaction between any two of the units involved (or by higher state officers) for the *purpose* of keeping one unit relatively white by confining blacks to another. . . .
>
> . . . .
>
> . . . The facts of this case do not establish . . . that state establishment and maintenance of school districts coterminous with the political subdivisions of the City of Richmond and the Counties of Chesterfield and Henrico have been *intended to circumvent* any federally protected right.

(Pet. A. 571-72, 580) (emphasis added). Having found no such invidious purpose or motivation, the court of appeals concluded there was no constitutional violation, and that the district court was thus without authority to act (Pet. A. 581).

This Court in *Emporia*, 92 S.Ct. 2196, however, made it clear that "effect" was controlling and that any inquiry into purpose or motivation was as irrelevant as it was fruitless in that the existence of permissible purposes cannot otherwise sustain actions that have an impermissible effect. *Emporia*, 92 S.Ct. at 2203. It is thus apparent that the decision of the court of appeals was predicated on a judicial standard which has been expressly rejected by this Court.

Moreover, the judgment of the court of appeals is irrecon-

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cilable with much of the rationale underlying the opinion of the dissenting Justices in *Emporia*, 92 S.Ct. at 2207-14. First, as evidenced by this Court's unanimous opinion in the companion case, *Scotland Neck*, 92 S.Ct. 2214, no Justice has questioned either the power of a district court in a proper case to enjoin state or local officials acting under state law from carving out a new school district from an existing district that had not yet completed the process of dismantling a system of enforced racial segregation, or the principle that the remedial powers of a district court are not limited by provisions of state law. The dissent in *Emporia* was not predicated, as was the opinion of the court of appeals in this case, on any tenth amendment limitation on the remedial powers of federal district courts, but rather on the belief that the lower court had abused its discretion in light of the particular facts and circumstances presented. Secondly, it would appear that on the particular facts presented in this record, the rationale employed in the *Emporia* dissent is indeed consistent with an affirmance of the relief decreed by the district judge below.

In his dissent, Mr. Chief Justice Burger emphasized that realities, not theories, were to be controlling, that a meaningful remedy was the basic criterion, that "dual systems must cease to exist in an objective sense as well as under the law" *Emporia*, 92 S.Ct. at 2208, and finally that

> [if] it appeared that the city of Emporia's operation of a separate school system would either perpetuate racial segregation in the schools of the Greensville County area or otherwise frustrate the dismantling of the dual system in that area, [he] would unhesitatingly join in reversing the judgment of the Court of Appeals and reinstating the judgment of the District Court.

Emporia, 92 S.Ct. at 2207 (dissenting opinion). It is clear that the dissenting Justices' disagreement with the majority

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in *Emporia* was based on the particular facts before the Court. One circumstance which disturbed the dissenting Justices was that the two separate systems each would have had majority black student racial compositions with a variance of only six per cent, which prompted the disbelief that "a difference of one or two children per class would even be noticed," or that "it would render a school part of a dual system." *Emporia*, 92 S.Ct. at 2209 (footnote omitted).

The realities disclosed by this record, however, are all too clear—gross racial disparities between adjoining school districts, one of which is overwhelmingly black and the other two of which are overwhelmingly white. The differences in the individual classrooms of the various schools in these contiguous districts are pronounced to the extent that the racial identifiability of schools in this area persists.

The dissenting Justices in *Emporia* also concluded that evidence of resegregation between the two systems was highly speculative and remote since the entire area was majority black, but nevertheless were careful to note that "[o]f course, when there are adjoining school districts differing in their racial compositions, it is always conceivable that the differences will be accentuated by the so-called 'white flight' phenomenon." *Emporia*, 92 S.Ct. at 2209. Applying this rationale to the Richmond area, the findings of the district court and the proven existence of the loss of 35 per cent of the white population of the Richmond school system in a 12-month period involving two school openings removes the probability of resegregation from the realm of speculation.

The dissenting Justices further felt that "it surpasse[d] the bounds of reason to equate the psychological impact of creating adjoining unitary school systems, both having Negro majorities, with the feelings of inferiority referred to in *Brown I*. . . ." *Emporia*, 92 S.Ct. at 2210.

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It is respectfully submitted that the findings of the district court as to the adverse effects on the children attending Richmond, Henrico and Chesterfield schools were not only amply supported by educational and sociological authorities who testified during the trial proceedings but, indeed, were well within the realm of common experience. The defendants in this suit have the power under provisions of State law to eliminate "black" and "white" schools, but have not done so; moreover, on this record, it is clear that they will never voluntarily do so.[83] The racial motivation underlying this refusal, as found by the district court, is all too obvious—the continued restriction of blacks to a center core, albeit a larger one, in an otherwise predominantly white area which has likewise expanded. The deleterious effects on perceptions and motivations of the school children are not, we respectfully submit, difficult to perceive even in the absence of the substantial testimony supporting such findings.

Finally, in the view of the dissenting Justices in *Emporia*, allowance of the continued operation of adjoining majority black systems there "would not [have] factually preserve[d] the separation of the races that existed in the past . . . ." and that "all vestiges of the discriminatory system would [have been] removed." *Emporia*, 92 S.Ct. at 2210. Measured by this standard, the failure to affirm the remedy decreed by the district court herein not only would effectively preserve past patterns of separate schools for the races, but would, in fact, engraft an indelible permanence upon the vestiges of the dual system of schools in the Richmond area through the

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[83] The district court made the following pertinent observation:

> [T]he court is satisfied from the evidence that given the attitude of the defendants the securing of the constitutional rights to which the plaintiff class are entitled will not be accomplished except under the supervision of the Court.

(Pet. A. 359).

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continued maintenance of the same historic pattern: black city schools encompassed by traditionally white suburban schools.

B.

EVEN UNDER THE OVERLY RESTRICTIVE TEST OF THE COURT OF APPEALS, THE RECORD HEREIN ESTABLISHES THAT THE CONTINUED MAINTENANCE OF THE EXISTING SCHOOL DIVISION LINES HAS, IN PART, BEEN RACIALLY MOTIVATED

It is clear that while the decision of the court of appeals severely limits the power of a district court to consider assignments of pupils across existing school division lines, it does admit of such a remedy upon a showing of racial motivation or purpose underlying the continued maintenance of these lines. This record, in fact, does establish that the persistent maintenance of the area's school division lines has been in part racially motivated. As the district court expressly found:

> [a] firm policy of resistance at the state and local levels to consolidation or other methods of cooperative pupil assignment [*i.e.*, contractual interchange of pupils] on any significant scale so as to bring about desegregation *has been related at each level to racial motives.* . . . There has been a discernible policy of refraining from taking such steps as would promote desegregation. . . .

(Pet. A. 212). After pointing out that all officials had been well advised of the facts creating the community school problem through the division of the Richmond area into racially identifiable sectors, and that the only realistic remedy at this time involved the crossing of area school lines, the district court further found as follows:

> Rejection of such a solution by the county and state defendants is explicable principally in terms of racial hostility. Opposition to desegregation in the counties

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has been the historical pattern to the present date. State officials have been guilty of encouraging or condoning such sentiment. County officials have publicly disclaimed any obligation to play an effective role in the desegregation of schools in the area and declared their opposition to effective desegregation and disapproval of Supreme Court rulings setting forth the law of the land on the subject. Considering the historic flexibility of political subdivisions in the state and in this area in matters of pupil exchange across political boundaries and in the cooperative operation of other public utilities, in view of the several statutory patterns—part of the public policy of the state—under which cooperative ventures can be undertaken, and in view of the fact that school operation in the counties has always entailed transportation times and distances similar to those involved in the suggested metropolitan plan, resistance to the proposal appears clearly to be racially based.

. . . .

. . . The evidence here indicates that a primary consideration in the refusal of county officials to establish cooperative school operation with Richmond has been their own concurrence with perceived constituents' opposition to integration efforts, which one county official termed "unamerican." This is not a legally cognizable objection.

Such an attitude is wholly at odds with considerations of one's affirmative obligation to exercise state-conferred powers affecting school administration so as to promote that end. The state and county officials equipped to alter the limits of attendance units unquestionably have that duty, their conduct affecting deeply the educational interests of many thousands of our youth and constitutional rights of the plaintiffs. Yet they have refused to act. . . .

. . . .

From the insubstantiality of nonracial reasons for adhering to political subdivision boundaries as attendance limits, the Court infers that insistence on such a

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policy must be predicated on its known racial effects. A purposeful, centrally compelled policy of segregation persisted in Virginia for many years; its effects endure today and affect the racial characteristics of the schools. Its abandonment has been gradual, piecemeal, and intentionally reluctant and is less than total today. No administrator can plead ignorance of these facts. At the same time, by means of repeated internal and outside surveys, reports, and recommendations, the magnitude of the problems of the depth of discrimination and its impact and the means to begin to alleviate it were presented to official bodies with the power to act. When their response was inaction or even contrary steps, it cannot be said that they acted without the intention of infringing constitutional rights. Informed of the consequences of past discrimination, they knowingly renewed or entrenched it. "[I]t was action taken with knowledge of the consequences, and the consequences were not merely possible; they were substantially certain. Under such conditions the action is unquestionably wilful." . . .

(Pet. A. 230-32, 258-59) (citations omitted).

Discussing the interrelationship of the existing lines with strict patterns of housing segregation, the district court concluded that "by the maintenance of existing school division lines the State advantages itself of private enforcement of discrimination and prolongs the effects of discriminatory acts of its own agents." (Pet. A. 195-96) (citation omitted).

Additional circumstances underlie and support the foregoing findings: the amendment of Section 22-30 of the Code of Virginia, effective July 1, 1971, created an additional obstacle for the combining of two or more political subdivisions into one school division through a first-time requirement of consent on the part of the governing bodies and school boards of the affected localities; at the time this suit was pending, the area school division lines were actually

redrawn and re-established by the State Board of Education without any consideration being given to the effects thereof on the process of desegregation or on the dismantling of the state-mandated system of dual schools; and there was open hostility on the part of County leaders to any integration—particularly with the children of the City of Richmond—which persisted up to and throughout the trial below.[84]

Hence, it is apparent that the record herein even satisfies the test of the court of appeals as to the necessity for establishing racial motivation in the continued maintenance of the existing school division lines. Even under such an erroneously restrictive test, the district court's findings required it to approve a plan involving pupil assignments across the school division lines in the Richmond metropolitan area.

C.

THE JUDGMENT OF THE COURT OF APPEALS EFFECTIVELY THWARTS THE GUIDELINES FOR THE FASHIONING OF EFFECTIVE RELIEF AS ESTABLISHED IN PRIOR DECISIONS OF THIS COURT

As this Court noted in *Emporia,* 92 S.Ct. at 2202, the court of appeals apparently did not consider that case to have been governed by the principles of *Green* and *Monroe v. Board of Commissioners,* 391 U.S. 450 (1968). The same general critique is fully applicable to its decision here in that the appellate court failed to reconcile its conclusions with no less than four key objectives previously established by this Court. Instead, the application of its rationale places rigid limitations on these guidelines with dire consequences to the future of school desegregation in de jure metropolitan areas.

"Effectiveness" has been firmly established as the measure of any desegregation plan.[85] Yet under the decision of the

[84] See note 42 *supra.*

[85] *E.g.,* Davis, 402 U.S. at 37; Emporia, 92 S.Ct. at 2203.

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court of appeals, irrespective of its relative effectiveness, the metropolitan desegregation plan involving assignments across existing school division lines was adjudged to have been beyond the scope of the lower court's remedial power absent proof of invidious racial purpose or motivation in the establishment or maintenance of those lines. The district court's conclusions as to the relative effectiveness of the metropolitan plan were not disputed by the court of appeals which, instead, noted that in his concern for effective relief the district judge had overlooked limitations upon his remedial powers (Pet. A. 563). If after years of extensive litigation the relief which has been afforded consists of little more than the maintenance of historically black schools, and indeed, the establishment of a substantially all-black system in the face of a viable and feasible alternative which promises realistically to work in providing equal educational opportunity, the promises of *Brown I* will in reality have little meaning to school children in the Richmond community.

This Court has also made it clear that the objective in the development of any desegregation plan should be the attainment of the greatest possible degree of actual desegregation and the elimination to the extent feasible of all vestiges of the dual system of schools.[86] Again, the overwhelming evidence before the district court was that attempts to desegregate within Richmond alone were futile exercises doomed to failure which paled in comparison to the realistic expectations provided by the City Board's metropolitan plan (Pet. A. 207-08, 230, 237, 239-40). The consequence of the judicial standard adopted by the court of appeals, however, presents a stark contrast between what will and what could occur: the promise of substantially all-black schools within the City surrounded by substantially all-white schools in the

[86] Davis, 402 U.S. at 37; Swann, 402 U.S. at 15; *cf.* Green, 391 U.S. at 437-38.

Counties with the attendant community and student perceptions of "black" and "white", "inferior" and "superior", schools, as opposed to the district court's remedy which promises realistically to erase the racial identifiability of schools in the area and to remove all vestiges of the dual school system which do in fact persist in the Richmond metropolitan area today.

This Court has also made it clear that in desegregating schools, district courts and school authorities as well have a duty to consider all available options and alternatives in selecting the plan which holds the greatest expectation of working in practice.[87] This mandate was limited by the court of appeals, however, to the extent that the district judge could not consider alternatives which involved either the interdivisional exchange of pupils or the consolidation of school districts even though he had found compelling factors and circumstances requiring such relief.

Regarding such available alternatives, it is important to note that Virginia law has never forbidden the contractual exchange of pupils between separate school divisions, that for many years there has been a legislatively conceived plan for the consolidation of school divisions consisting of more than one political subdivision, and that current laws make no requirement that school divisions conform to political subdivision boundaries[88] (Pet. A. 227-29, 607-13, 618-21). Even though the present law (Section 22-30 of the Code of Virginia) requires the consent of the local governing bodies and school boards prior to a consolidation (Pet. A. 228, 617), it is axiomatic that the enjoyment of fundamental constitutional rights cannot be made to depend upon any

[87] *E.g.*, Green, 391 U.S. at 439.

[88] See note 51 *supra;* notes 62 & 63 *supra* and accompanying text.

popular consent[89] and that state laws which serve as
nents or barriers to the effective disestablishment of
hool systems are not binding on a district court in its
tion of effective relief.[90] Moreover, the district court
required and ordered the State and County defend-
exercise powers which had been expressly granted
by State law (Pet. A. 538-40).

arly, the court of appeals made no reference to the
nts of this Court to the effect that the most potent
s for the dismantling of dual school systems lie in the
of school districts and attendance areas.[91]

the analogy which this Court has drawn between the
of relief in school desegregation and antitrust cases,[92]
r that an effective plan should, to the extent feasible,
the recurrence of the evils sought to be corrected.
trict court's concern over the resegregation of the City
was amply supported by the evidence establishing a
ent loss of white students within 12 months under the
chmond-only desegregation plans. Yet the court of
without even alluding to the district judge's con-
as to the lack of any realistic chance for effective
ithin the City system, established a standard which
ed to this case will insure a return to the situation
xisted in 1954 and in 1969-70 as well, *i.e.*, all black
in Richmond and, indeed, 85 per cent of all black
n the Richmond metropolitan area, will be attending

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736-37
Haney v. County Bd. of Educ., 410 F.2d 920, 925 (8th Cir.

and Neck, 92 S.Ct. at 2217, *quoting* North Carolina State Bd.
v. Swann, 402 U.S. 43, 45 (1971); *see also* cases cited note

n II, 349 U.S. at 300-01; Swann, 402 U.S. at 27.

ote 55 *supra*.

virtually all-black schools surrounded by substantially all-white schools.

D.

THE DECISION OF THE COURT OF APPEALS WAS BASED ON "NEW" FINDINGS ACHIEVED THROUGH A SIGNIFICANT DEPARTURE FROM THE STANDARD OF APPELLATE REVIEW IN SCHOOL DESEGREGATION CASES

This Court has made it clear that the weighing of facts and circumstances to determine their effect upon the process of desegregation is a delicate task that is aided by the sensitivity of the trier of facts to local conditions, and that the judgment with respect thereto is primarily the responsibility of the district court.[93] Furthermore, as this Court has specifically ruled in another school desegregation case, a court of appeals commits error when it substitutes its own findings for those of the district court which are supported by substantial evidence.[94] From a comparison of the court of appeals' opinion with the record in this case, however, it is clear that in critical areas the appellate court substituted its evaluation of the evidence for that of the district judge.

In concluding that the desegregation of schools by the three school divisions involved was pathetically incomplete (Pet. A. 237), the district court had considered voluminous evidence relating to the actual operation of the Richmond, Henrico and Chesterfield schools for many years including the term which had concluded in June of 1971, approximately two months prior to the hearings below.

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[93] *E.g., Emporia*, 92 S.Ct. at 2205, *citing* Brown II, 349 U.S. at 299; *see also* Swann, 402 U.S. at 28.

[94] Northcross v. Board of Educ., 397 U.S. 232, 235 (1970). The United States Court of Appeals for the Seventh Circuit, in a school desegregation case as well, has recently recognized this established constraint on its powers of review. United States v. Board of School Comm'rs., No. 72-1031 (7th Cir., decided Feb. 1, 1973) (slip opinion at 6).

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In phrasing the issue in its terms, however, the court of appeals in the initial paragraph of its opinion implicitly assumed the operation of unitary systems by all three school divisions involved[95] (Pet. A. 562). No party, however, including the Richmond School Board, contended that the City had achieved a unitary system during the 1970-71 school year. The basis for such an assumption by the appellate court is thus unclear. Moreover, as is implied in subsequent portions of its opinion, the court of appeals agreed that neither Henrico nor Chesterfield had attained a unitary system during the 1970-71 year, the last school year for which data was available. The appellate court stated that with the discontinuation by Chesterfield of its connection with Matoaca Laboratory School (which occurred subsequent to the 1970-71 school year)[96] and Henrico County's announced plan to reassign the 40 per cent of its total black elementary enrollment which had attended Central Gardens School during the 1970-71 school year, the systems had become unitary[97]

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[95] In Judge Winter's view, he probably would not have dissented "were the case as simple as described in the opening paragraph of the majority opinion. . . ." (Pet. A. 585 n. 1)

[96] Prior to the 1971-72 school year, the Matoaca Laboratory Elementary School, on the grounds of Virginia State College, was listed as a Chesterfield County school and was administered by the Chesterfield School Board with regard to the disbursement of State funds, pupil transportation, teaching materials, food service and the like (Pet. A. 385). In submitting compliance data to HEW in 1971, the County reported Matoaca Lab as an all-black school with an all-black faculty. When challenged by HEW, Chesterfield responded by dropping Matoaca Lab from its system as of 1971-72 (Pet. A. 386). The facility is still operated as a virtually all-black elementary school. Thus, at the time the district court rendered its opinion and order, the precise responsibility for the operation of Matoaca Lab was unclear, and the court of appeals apparently chose to ignore the clear implication of the State of Virginia in the continued operation of this all-black public school.

[97] These measures, of course, occurred *after the commencement of the trial proceedings below*. Regarding actions taken by school au-

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(Pet. A. 571-72). Remarkably, the court of appeals made this assumption without reference to any of the other non-unitary features which had been considered by the district judge such as the racial identifiability of faculties and the gross examples of racial isolation in other schools (Pet. A. 384, 397, 524-29), and, indeed, without the benefit of relevant data subsequent to the 1970-71 school year.

It is apparent from the opinion of the court of appeals that it was troubled by the size of the proposed consolidated school division and by problems of finance and budgeting which in its opinion were sufficient to "boggle the mind" (Pet. A. 578). Suffice it to point out that after weighing the extensive evidence presented on all such aspects of the proposed metropolitan desegregation plan, the district court concluded that the optimal size of any school district was largely dependent on the objectives sought to be attained (having before it evidence of the eminently successful operation of the Fairfax, Virginia school system consisting of more than 135,000 students), and that in all respects the weight of the testimony from the educational experts established that the proposed plan was reasonable, feasible and workable[98] (Pet. A. 432). In addition, the district court had considerable evidence before it that many of the very features that the court of appeals found disturbing had proved work-

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thorities to correct illegal segregation *after the date on which a particular suit had been filed*, the United States Court of Appeals for the Seventh Circuit has acknowledged that "such actions go more to the propriety of granting equitable relief, rather than to the merits of the district court's findings." United States v. Board of School Comm'rs., No. 72-1031 (7th Cir., decided Feb. 1, 1973) (slip opinion at 13).

[98] Regarding all the testimony as to "optimum" school district size, the district court specifically found that '[c]urrent studies . . . focus principally on the *minimum* size required for a particular purpose" (Pet. A. 432) (emphasis added).

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able in the operation of State-authorized joint schools as well as all-black regional schools (Pet. A. 352-56); indeed, the existence of detailed Virginia laws governing the operation of school divisions consisting of more than one political subdivision (Pet. A. 608-13, 618-21) clearly indicates that such problems were not considered insurmountable by this State's own lawmakers. Certainly no school desegregation case to date upholds the substitution by an appellate court of *new* conclusions regarding elements of the feasibility of desegregation plans when substantial evidence supports findings made by a district court.[99]

In other instances, the court of appeals seized upon one item of evidence relating to a certain point and drew conclusions different from those of the district court without reference to any of the other evidence on the same issue. As a significant example, the appellate court focused upon the testimony of one County official relating to his interpretations of the findings of a questionnaire submitted to students to determine the number who had previously attended City schools. The testimony, designed to establish that relatively few County students ever had attended Richmond schools, convinced the court of appeals that the evidence failed to establish that the City's white students were fleeing to County schools (Pet. A. 573). On this issue, the district court had weighed a considerable amount of evidence establishing the losses of whites from the City system including the testimony in question and, with respect to the results of the specified questionnaire, the record indicated that the County Superintendent was unable to give any detailed information as to the scope, extensiveness or degree of participation by County students (A. 1026-27). In addition, this Superintendent had previously admitted that his staff had been con-

[99] *Cf.* cases cited note 94 *supra.*

fronted with the problem of white parents and students from Richmond giving false County addresses and renting unoccupied apartments for the purpose of gaining admission to the substantially all-white schools in the County (A. 491; Pet. A. 383). Certainly, it is doubtful that students engaging in such activities would candidly answer any questionnaire exposing their actions. Further, the questionnaire obviously failed to reflect the degree of white attrition occasioned by parents moving to the Counties so that their children could be initially enrolled in County schools. This further explanation of the record upon which the district court relied is illustrative of the danger inherent in any departure from the accepted standard of judicial review of factual determinations.

On the question of the effects of admitted racial discrimination by all three political subdivisions in housing and the admitted refusal of the Counties to take steps necessary to allow the construction of low-cost or rent-subsidized housing, the court of appeals concluded that it was "unable to determine whether such discrimination, practiced in all three units, has had any impact upon movement by blacks out of the city and into the counties" (Pet. A. 574). The district court's conclusions in this area, however, were predicated on substantial evidence and testimony providing a reasonable basis for its determinations that discrimination in housing, school site selection and construction, public employment, and County operation of small, inferior all-black schools through the late 1960's and County inaction in failing to provide low-cost housing had operated to contain blacks within Richmond, in turn, accentuating the extreme racial disparity between the City and the two Counties (Pet. A. 195-211, 380-82, 392).

These illustrative intrusions upon the normal standard of appellate review which under Rule 52(a), Fed. R. Civ. P.,

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is limited to the extent that the findings of a district court may be set aside only if found to be clearly erroneous, require this Court to find that the court of appeals erred.

E.

THE RATIONALE OF THE COURT OF APPEALS VARIES WITH THAT UTILIZED BY OTHER FEDERAL COURTS IN RELATED CASES

Though factually distinguishable, the issues presented herein are closely akin to those dealt with in *Emporia* and *Scotland Neck* as well as other cases involving the attempted creation of splinter school districts. In pointing out that it was unfortunately predictable that a court which had approved the dismantling of existing school districts so as to create smaller whiter enclaves had now rejected the consolidation of school districts to make effective the mandate of *Brown I* and its progeny (Pet. A. 585-86), Judge Winter made the following comparison:

> . . . While the district court attempted to distinguish these cases, the fact is that they are simply the obverse of the same coin which is presented here. In each of *Scotland Neck* and *Emporia*, the effect of splitting the school district was further to delay and hinder the achievement of what would otherwise have been a unitary system in the original district, although arguably there were noninvidious reasons for subdividing. Here, as I view the case, the question is one of consolidating school districts *within the framework of state law* in order to eradicate the effects of past discrimination and to achieve a unitary system. Logically it is impossible to sustain the former and not condemn the converse. . . .

(Pet. A. 585 n. 1)

As noted by this Court in *Emporia*, the reasoning of the court of appeals differed materially from that utilized by

other federal courts which had prohibited the carving out of "white enclaves" based not on the motive or purpose underlying the actions taken by the respective school authorities, but on the *effect* of such practices.[100] If the court of appeals' decision is left undisturbed, the result would be productive of the following incongruity: in the splinter district cases the actions of state and local school authorities would be judged in terms of their effect on the dismantling process, whereas such a test would be irrelevant in prescribing the circumstances under which a district court may require either the assignment of students across existing school division lines or the merger of existing districts in accordance with provisions of state law in order to alleviate the effects of past discrimination. The criteria should be the same, however, since in both instances school boundaries affect the dismantling process by serving as barriers to effective desegregation.

The severe limitation on the remedial powers of the district court occasioned by the court of appeals' reliance on both Virginia tradition and the tenth amendment to sanctify existing school division lines (Pet. A. 575-80) is in sharp contrast with the view of the United States Court of Appeals for the Eighth Circuit as expressed in *Haney v. County Board of Education*, 410 F.2d 920 (8th Cir. 1969) [hereinafter cited as *Haney*]:

> If segregation in public schools could be justified simply because of pre-*Brown* geographic structuring of

[100] Emporia, 92 S.Ct. at 2203, *citing* Lee v. Macon County Bd. of Educ., 448 F.2d 746, 752 (5th Cir. 1971); Stout v. Jefferson County Bd. of Educ., 448 F.2d 403, 404 (5th Cir. 1971); Haney v. County Bd. of Educ., 410 F.2d 920, 929 (8th Cir. 1969); Burleson v. County Bd. of Election Comm'rs., 308 F.Supp. 352, 356 (E.D. Ark.), *aff'd*, 432 F.2d 1356 (8th Cir. 1970); Aytch v. Mitchell, 320 F.Supp. 1372, 1377 (E.D. Ark. 1971).

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> school districts, the equal protection clause would have little meaning. . . .
>
> State legislative district lines, congressional district and other state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens. . . . [*citing* Gomillion v. Lightfoot, 364 U.S. 339 (1960)].
>
> Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights. . . .[101]

The court of appeals made no reference to the district court's finding that the existing school division lines were redrawn as late as July 1, 1971, pursuant to the requirements of the revised State constitution which took effect on the same date (Pet. A. 229). This express reaffirmance of the present school division lines had the uncontradicted effect of a state-approved separation of an existing 70 per cent black school division (Richmond) from the two 90 per cent white school divisions surrounding it. Furthermore, this redrawing occurred at a time when the State was under a clear and continuing duty to take whatever steps might be necessary to eradicate all vestiges of its dual system of schools.[102] The failure of the court of appeals to even consider this a proper point of inquiry cannot be squared with the rationale of the court in *Haney* that "[i]t would be sheer fantasy to say that the school districts in Sevier County could be realigned today in the same manner that they were

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[101] Haney, 410 F.2d at 924-25, *citing* Reynolds v. Sims, 377 U.S. 533 (1964); Hall v. St. Helena Parish School Bd., 197 F.Supp. 649, 658 (E.D. La.), *aff'd*, 287 F.2d 376 (5th Cir. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

[102] See note 76 *supra*.

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in 1948 and still comply with the constitutional mandate of *Brown I* and *II*." *Haney*, 410 F.2d at 924.

With regard to the force and effect of Virginia's consent requirement regarding the consolidation of separate school districts, the court of appeals mistakenly felt that it would have been necessary to have held such a limitation unconstitutional had the plan approved by the lower court been affirmed (Pet. A. 575, 577-78). Such reasoning, however, ignores the basic tenet that the enjoyment of constitutional rights cannot be made dependent upon popular consent. As was expressed by the court in *Haney*,

> . . . [t]he argument that 'equal protection' rights must depend upon the majority vote has never found foothold under our form of constitutional government. Democratic government under our Constitution respects the majority will, but our forefathers had sufficient vision to insure that even the many must give way to certain fundamental rights of the few.

Haney, 410 F.2d at 925 (citations omitted).

Also ignored by the court of appeals was the settled principle that the remedial powers of a district court cannot be limited by provisions of state law.[103]

Finally, even though its opinion was subsequently vacated pursuant to the granting of an en banc rehearing, it is significant that a three judge panel of the United States Court of Appeals for the Sixth Circuit in a desegregation case involving the Detroit, Michigan school system has noted its rejection of "the contention that school district lines [were] sacrosanct and that the jurisdiction of the District Court to

[103] Haney, 410 F.2d 920; United States v. Greenwood Mun. Sep. School Dist., 406 F.2d 1086, 1094 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969).

grant equitable relief . . . [was] limited to the geographical boundaries of Detroit."[104] Concluding that "the District Court . . . [was] not confined to the boundary lines of Detroit in fashioning equitable relief", that panel specifically declined to follow the decision of the court of appeals in this case.[105]

Even though the foregoing opinion is not in effect at this time, the applicability of the views of such experienced circuit judges to this case cannot be denied. Of even greater significance, the similar conclusions of the district court herein were based on a record which is much stronger than that which is currently before the Sixth Circuit. In addition to the same type of factual considerations giving rise to the metropolitan relief in Detroit,[106] the record here docu-

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[104] Bradley v. Milliken, Nos. 72-1809, -1814 (6th Cir., filed Dec. 8, 1972), *vacated for rehearing en banc* (Jan. 16, 1973) (slip opinion at 66). This panel had before it *inter alia* four interlocutory orders entered by the district court which had found generally that relief from school segregation could not have been effectively provided by any of the intra-city plans, and that the only realistic plan for desegregation of the Detroit system would have required the assignment of students between a number of city-suburban school districts in the Detroit metropolitan area. See Bradley v. Milliken, 338 F.Supp. 582 (E.D. Mich. S.D. 1971) (ruling as to illegal segregation existing within Detroit system); Bradley v. Milliken, No. 35257 (E.D. Mich. S.D., Mar. 24, 28, June 14, 1972) (ruling on propriety of metropolitan remedy, findings and conclusions on "Detroit only" relief, and ruling on desegregation area and development of plan, respectively).

On February 8, 1973, appellate arguments concerning the relief decreed for the Detroit metropolitan area were made before the full court of appeals which currently has the matter under advisement.

[105] Bradley v. Milliken, Nos. 72-1809, -1814 (6th Cir., filed Dec. 8, 1972), *vacated for rehearing en banc* (Jan. 16, 1973) (slip opinion at 67).

[106] Similar issues are likewise involved in cases which are in various stages of litigation in federal district courts. In a suit brought to desegregate the schools of Indianapolis, Indiana, the district judge there found that the city schools were illegally segregated, and that since

ments the following: the very evil proscribed by *Brown I*—a state with a long history of enforced separation of the races in public education; tortious years of overt defiance and delay in the face of an announced constitutional mandate; pervasive discrimination on the part of all of the school divisions involved; and an abundance of state laws and conduct encouraging both the combining of separate political subdivisions into single school divisions and the interdivisional assignment of pupils for valid educational purposes as well as for the perpetuation of segregation. Finally, the lower court here had the actual experience of witnessing the utter futility of attempts to provide effective relief within the City of Richmond alone.

In summary, the use by the court of appeals of an invidious motivation standard which resulted in the sanctification of existing school boundaries is clearly contrary to the effect-oriented test which this Court adopted in *Emporia* and

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any plan of desegregation confined to the city system alone might not work in affording a realistic remedy, suburban school districts in the Indianapolis metropolitan area should be joined as parties so that the matter could be fully litigated. United States v. Board of School Comm'rs. of City of Indianapolis, 332 F.Supp. 655 (S.D. Ind. 1971), *aff'd*, No. 72-1031 (7th Cir., decided Feb. 1, 1973). This Court has refused to hear questions presented by one of the newly joined suburban school districts regarding the propriety of the joinder action. School Town of Speedway v. Dillin, *cert. denied*, ... U.S. ....., 92 S.Ct. 2457 (1972). Related questions have arisen in a case involving the Atlanta, Georgia school system. In *Calhoun v. Cook*, 332 F.Supp. 804 (N.D. Ga. 1971), the district court noted that at the time the case was originally filed in 1958, the Atlanta system was approximately 70 per cent white whereas at the time of its decision, there had been a complete reversal in percentages in that the system was then 70 per cent black. Calhoun, 332 F.Supp. at 805. The United States Court of Appeals for the Fifth Circuit has specifically directed that the district court make supplemental findings of fact and conclusions of law with regard to suggestions made by the latter concerning the desirability of a metropolitan area solution to the increasing segregation within the Atlanta system. Calhoun v. Cook, 451 F.2d 583 (5th Cir. 1971).

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which had been applied previously by other federal courts. The dire consequences which would flow from an affirmance of the unique approach of the court of appeals are all too clear. The tenth amendment, concerned with neither individual justice nor equality, would preclude an effective, feasible remedy for a long-standing denial of equal educational opportunity. The children in the Richmond metropolitan area for the foreseeable future would thus attend clearly identifiable black or white schools just as previous generations had done both prior to and after 1954.[107]

CONCLUSION

In the view of the district court, the nature of the relief required under this Court's previous decisions from *Brown I* through *Swann* and *Davis* necessitated the assignment of pupils across the existing school division lines in the Richmond metropolitan area. Based on a legislatively conceived alternative for the operation of schools, the lower court's order was fully supported by exhaustive findings which the court of appeals failed to find as clearly erroneous, instead basing its reversal on legal principles which run counter to guidelines established by this Court as well as others. The effect of the decision of the court of appeals is to perpetuate

[107] Chief Judge Phillips in his vacated opinion regarding the necessity for a plan of desegregation extending beyond the boundaries of the Detroit School District, recalled the admonition from Chief Justice Marshall:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Bradley v. Milliken, Nos. 72-1809, -1814 (6th Cir., filed Dec. 8, 1972), *vacated for rehearing en banc* (Jan. 16, 1973) (slip opinion at 66), *citing* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

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indefinitely the vestiges of the dual system of schools which remain in the Richmond metropolitan area thus rendering illusory the promises inherent in *Brown I*.

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the district court's January 10, 1972 order reinstated with directions that it be implemented forthwith.

Respectfully submitted,

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